

per 25. 6th

A
VIEWV OF
THE
CIVILE AND
ECCLESIASTI-
C ALL LAW.

And wherein the Practice of them
is streitned, and may be releevd
within this Land.

Written by S^r. THOMAS RIDLEY knight;
Doctor of the Civile Law.

The Third Edition.

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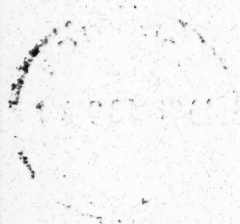
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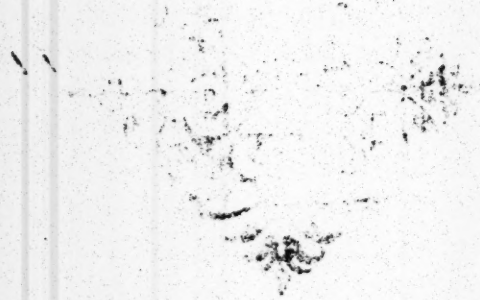
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TO THE HIGH AND
Mighty Prince JAMES, by the grace
of God, King of Great Britaine, France
and Ireland, Defender of the Faith, &c.

MOST gracious Sovereigne, since it
hath pleased Your Majestie of
Your Princely care towards the
Church, and Your Common-
wealth, to take knowledge of some differen-
ces, that are in Iudicature between Your Ec-
clesiastical and Civile Law, and the Tempo-
rall Law of this Land (by which joyntly
Your Majesties State is managed next after
Your owne most rare providence, and the
wisdome of such, whom it hath pleased Your
Highnesse to associate unto Your selfe in the
great affaires of Your Kingdome) I have been
bold to offer unto your Majestie this simple
Treatise, as that which doth lay out the cause
of those Differences, more particularly than
any

THE PREFACE
any man hitherto hath expressed the same. In
comming to which (because I doe speake for
those parts of your Majesties Lawes, which
are lesse knowne unto your people, and e-
steemed no otherwise of them, than they see
the practice thereof to bee heere within your
Land) I have thought good, as it were in a
Brieve, to set out the whole summe of both
the Lawes, to the view of the people, that they
may see, there is more worth in those for
whom I speake, than was by many conceived
to bee: So that the profession of the Ecclesia-
sticall and Civile Law may appeare to the
world, neither to bee idle nor unfit for the
State; so farre as it hath pleased the Royall
Predecessours of your Highnesse to give en-
ertainment unto it, and Your Majesty Your
selfe to admit of it. In all which there is no o-
ther thing sought, than that such greivances as
have beene of late offered by one Iurisdiction
unto the other, and in consequence, to all
Your Subjects, who follow any suits in the
Civile or Ecclesiasticall Courts, may by Your
Princely wisdom be considered, and by your
authoritie be redressed, if they be found to be
greivance

DEDICATORY

grievances indeed: for now as things are, nei-
 ther Iurisdiction knowes their owne bounds,
 but one snatcheth from the other, in manner,
 as in a batable ground lying betwene two
 Kingdomes; But so that the weaker ever go-
 eth to the worse, and that which is mightier
 prevailes against the other: the professors
 thereof being rather willing to give Lawes
 and interpretations to other, than to take or
 admit of any against themselves For which
 the weaker appeales unto your Highnesse,
 humbly desiring your Majesties upright and
 sincere iudgement to discern where the
 wrong is, and to redresse it accordingly, which
 is a worke worthy your Maiesties high con-
 sideration. For as the Land is yours, so also
 the Sea is yours, and the Church is under
 your Highnesse protection, as a Childe is un-
 der his Tutor: so that all the Lawes thereof
 appertaine unto your Maicsties care & com-
 fort alike: For which, not onely the whole
 profession of your Ecclesiasticall and Civile
 Lawyers that now are, but those which shall
 succeed in those places for ever hereafter unto
 the worlds end, will praise and magnifie
 * * *
 your

THE EPISTLE DEDICATORIE.

Your Majesties gracious favour towards
them, and we that now are will pray to God
for the long and happy prosperitie of your
Highnesse, and Your Posteritie over us, du-
ring the continuance of this Heaven and this
Earth, and after the passing away thereof, a
perpetuall fruition of the new Heaven and
the new Earth, wherein righteousness
onely shall dwell for ever.

*Your Majesties most humble
and dutifull Subject,*

THOMAS RIDLEY.



To the Reader.

GEntle Reader, I confesse, as I meditated this Treatise upon mine owne motion (as I do sometimes matters of other argument, when my leasure serves me thereto) so also I do not set it out to the view of the world upon mine own motion, but was desirous it should have been kept in, saving that I must obey where I am bound. The thing that gave mee cause to this meditation, was, that I saw many times how meanly men esteemed of the Civill and Ecclesiasticall Law of this land, valuing them by the practise of so much of them, as we have among us. And therefore I thought good, although not wholly to unfold the riches of them, yet to make shew of them folded up, in such sort as mercers make shew of their silks and velvets, laid up in whole peeces in their shops; wherby it may be seen, what great variety they have of all these kind of wares; although the goodnes of the ware it self cannot be discerned because it is folded up: Besides, seeing how frequent prohibitions are in these dayes in causes of either cognisance more then hath been in former time, I thought it not unworthy my labour to inquire & see upon what just grounds they are raised up in this multitude: not of any humour I have, to gainsay the lawfull proceedings of any Court (which I reverence and most readily acknowledge their authority in all things belonging to their place) but to know and search out the truth of those suggestions that give cause unto these prohibitions. For whereas such lawes as are written of these businesses, are written indifferently, as well for the one jurisdiction as the other, no man is to be offended if the one jurisdiction, finding it selfe pressed

To the Reader.

sed by the partial interpretation (as it supposeth) of the other, inquire the ground of such interpretation, and labour to redresse it if it may be, by the right interpretation thereof: To the end, that either Jurisdiction may retain their own right, and not the one bee overtapt by the other, as it seemeth to be at this day: And that in such matters (as they concerne) of their own right, as depend of no other authority but of the Prince alone: which is the thing only that is sought in this little Treatise. And therefore the Reverend Judges of this Land are to be intreated, that they will vouchsafe an equal interpretation of these matters, as well to the one jurisdiction as the other, for so it is comely for them to doe; and if they doe it not, the other are not so daunted, but they can perceive it, nor so daunted but that they can flie for succour unto him, to whose high place and wisdom the deciding of these differences doth of right appertain. **PENLOPE** is said to have had many wooers comely in person and eloquent in speech, but she respected none but her own **VLYSSES**: Such should bee the mind of a Judge, that whatsoever other appearance or shew of truth be offered, one saying. This is the true sence of the Law, and another that, the Judge should respect none but the very true germane and genuine sence thereof indeed. Which if it were religiously or indifferently observed in every Court, then needed not this complaint that now is, but every jurisdiction should peaceably hold his own right, such as the Prince, Law, or Custome hath afforded unto it.

Thomas Ridley.



A VIEW OF THE
Civile and Ecclesiasticall Law:
also wherein it is straightned, and
wherein it may be releevd.

PART I.
CHAP. I.
SECT. I.

The Division of the whole booke into foure parts.

What right or Law is in generall.

What is the Law publick, & what the Law private.

What is the Law of Nature.

What is the Law of Nations.

What is the law Civile.



Before I shew how necessary it is for his
Majestie and the Realme, to maintaine
the Civile & Ecclesiasticall Lawes, as they
are now practised among us in this Realm,
I will set downe, as it were, in a briefe,
what the Civile, and the Ecclesiasticall
Lawes are: then will I shew how farre forth they are
here in use and practise among us: thirdly wherein wee
are abridged, and put beside the use and possession there-
of, by the Common Law, even contrary to the old practise
thereof, and the true sence and meaning of the Lawes of
this Realme, and the Statutes in this behalfe provided: and
lastly,

What Law is,

Jus publicum.
1.

lastly, wherein we might be relieved and admitted to the practise of many things in the Civile Law, without prejudice to the Common Law, and so both the Lawes might know their owne grounds and proper subjects, and not one to be jumbled with the other, as it is at this day, to the great vexation of the subject. But before I speake of the Civile Law in particular, I will define what Right, or Law is, in generall: Law therefore is (as *Ulpian* saith, *L. 10. in fin. ff. de Justitia & Jure*) the knowledge of Civile and humane things, the understanding of those things which are just and unjust. This Law is primarily divided into the Law publick, and the Law private. The publick, is that which appertaineth to the generall state, of the common-wealth, for I meane the Law publick, not in respect of the Forme, that they were publickly made, as we make lawes in our Parliaments (for so all the Civile Law is publick, as made by publick auctority) but in respect of the object, or end thereof, for that they concerne the Church, the Clergie, the Magistrate, and other like publick functions, none of which levell at the rule of equity, or equality between man and man, as private lawes doe, but ayme at that which is most fit, in generall, for the common State.

Jus privatum.
2.

The private Law, or the private mens Law, is that which concernes every singular mans state; which, for that it is occupied in giving every man his owne, it must of necessitie be proportionable to the rule of Equitie and Justice.

Private Law is of three sorts, the law of nature, the law of Nations, and the law Civile.

The Law of Nature,

The law of Nature, is that which Nature hath taught every living creature, as the care and defence of every creatures life, desire of libertie, the conjunction of male and female for procreation sake.

The Law of Nations.

The Law of Nations, is that which common reason hath established among men, and is observed alike in all Nations, as distinctions of mens rights, buildings of houses, erecting

erecting of Cities, societie of life, judgments of controversies, war, peace, captivity, contracts, obligations, succession, and the like.

The law Civile, being largely taken, is the law that every particular Nation frameth to it selfe, as the *Athenian* lawes, and the lawes of *Lacedemon*, in which sence also the law of *England* may be called the Civile law, for that it is the proper and private law of this Nation: but in more strict sort, the Civile law is the law, which the old *Romans* used, and is for the great wisdom & equitie therof, at this day, as it were, the common law of all well governed Nations, a very few onely excepted.

And certainly, albeit sundry other Nations by the light of Nature, have many Rules and Maximes in the Civile law: yet, if all the constitutions, customes, and lawes, of all other people and countries were put together, (I except none, save the lawes of the *Hebrews*, which came immediatly from God) they are not comparable to the law of the *Romans*, neither in wisdom nor equitie, neither in gravitie nor in sufficiency. Whereupon it is, that most of other Nations, (saving our owne) although they receive not the Civile law wholly for their law, yet they so much admire the equitie thereof, that they interpret their owne lawes thereby. *Peckius de regul. juris. Reg. Qua à jure communi. regul. 28.*

SECT. 3.

That there be foure Tomes of the Civile Law; The Digest, the Code, the Authentick and the Feuds.

The Institutes are an Epitome of the Digest.

What is the Digest, and why it is so called, and why the same are called the Pandects.

What are the Institutes, and why they are so called.

THe whole Civile law it selfe, is reduced or brought into 4. Tomes, whereof the first containeth the Digest or Pandects, taken out of 27. old reverent Lawyers

Digests whar. workes; whereof sundry were before the coming of Christ; others flourished in the Emperours dayes, even unto the time of *Maximinus*, as it appeareth by *Spartianus* and *Lampridius*, in the life of the said Emperour: which said Tome is divided into 50. bookes, of which, every one containeth sundry titles of great wisdom and variety.

To this Tome, I adde the Institutions, which are brief of all the former bookes, composed of purpose by the Emperour in the behalf of young learners, that thereby having the whole Digest drawne into a *Compendium* of 4. bookes onely, they might with more alacrity, goe forward in the study of the Law: having, as it were, the first Elements of the whole profession in this little Treatise; whereas otherwise without the help hereof, their weak minds might be clogged with the multitude and varietie thereof, and so either altogether leave their studies, or with more labour and diffidence (which oftentimes discourageth young mens minds in a long matter) come to the end thereof, to which, by the direction of this brief, they might sooner attain, and that without much travell or distrust.

why so called. The Digests have their name, of that they are put into a comely order by the Author, ranging every booke and title into his proper place, such as either the course of Nature affords them, or are fittest for the practise of the profession.

The Pandects. The same booke again, is called *Pandects*, of the Greek words *παν* & *δεκται*, for that it compriseth in it selfe, all whatsoever *Justinian* drew out of 150000. verses of the old bookes of law.

The Institutes. The Institutes are so called, because they are, as it were, masters and instructors to the ignorant, and shew an easie way to the obtaining of the knowledge of the Law.

The matters wherein the whole law is occupied, are either the persons in common-wealth, or the things belonging or not belonging to them, or the actions whereby

by men doe claim in judgments such things as are due unto them dy law.

SECT. 3.

The Pandects, or Digest are divided into seven parts, and they againe into fiftie Bookes.

That the first part thereof conteineth foure Bookes, and what is the summe thereof.

VPon a more particular division, the whole Digest is divided into seven parts: whereof the first part, standing upon foure bookes, containeth the principles, and as it were, the first elements of the Law; as, what Justice & Right is, from whence the Civile Law hath his beginning, what persons be the object of the Civile Law, what Magistrates the common-wealth of the *Romans* had, by whom either the lawes were made, or executed: the divers kindes of Iurisdiccions, which those Magistrates used; Meere, Mixt, or Simple, according to their place: the corrections which the law used against such as disobey the Iudge, either in not appearing, or not performing that which is injoynd them: what provision it made against such, as by violence rescued men out of the Iudges hands: what Holy-dayes there were, wherein the Courts were not held: what order the Law tooke against the plaintife, that having cited the defendant, had no Libell ready to put into the Court, unlesse happely otherwise the parties upon private agreement compounded the matter betweene them: who were to be admitted advocates, and what causes barr'd them from the office: what is the office of a Procurator, Sollicitor, or Syndick, or Factor; and under what cautions they were admitted, if they had no Proxie, or Mandat, or the partie principall did not in presence authorize them: how they were punished, who upon reward tooke upon them to vex men unjustly in the Law, in manner as common Barators doe: what persons having lost opportunitie to alleage any thing for themselves

selves beneficiall in Law , may be restored thereunto againe ; as Minors, and such other , as by feare or craft of the adversarie have beene driven away from their lawfull defence : how persons of common trust , as Mariners, Inholders, and such like, are bound by Law to restore such things as they have taken in charge to keepe.

SECT. 4.

That the second part hath seven bookes, and what are the Contents thereof.

THe second part , being distributed into seven bookes, yeeldeth matter of Judgment, as who may be Judge, and who not : where and before what Judge every one is to be convented: how many kindes of Judgements there are, Civile, Criminall, and mixt of both : by what actions things that are ours by right of inheritance may be challenged, whether they be corporall or incorporall : what action the Law affords , if any man conceale that is ours, that wee may come to the sight thereof : what action lyeth against him, who by evill persuasions, or lewd inticement hath corrupted another mans servant, or having run away by his ill counsell , hath concealed him from his master : what provision the law hath against Dice-play, and such as keepe Dicing-houses: how he is to be punished, which being put in trust to measure any mans ground, makes a false report of the measure thereof : that no man hinder a corse of a dead body to be carried to buriall , or to be buried in such places , as hee and his predecessours have right unto, or to build a Tombe to that purpose, and beautifie the same.

SECT. 5.

That the third part stretcheth it selfe into nine bookes, and what they contain.

THe third part, imbracing nine books, concerneth personall actions, which rise not of cause of right or possession,

sion, but of covenant and obligation ; as things credited or lent in a certain summe; the meanes how to recover the same, if it be denied, *that is by oath of the partie that denieth it, unlesse he may be convicted, either by witnesse or instrument, that he hath forsworne himselfe:* how many kinds of oaths there are voluntary out of Judgement : necessarie exacted by the Judge in doubtfull cales, where otherwise there wanteth prooffe to manifest the truth: Judiciall, such as one partie offereth to another in Iudgement, and cannot be refused without iust cause: and lastly, that which the Iudge offereth to the plaintife, as concerning the value of the thing which is in strite, or the charges that he hath beene at in recovering of the same: what exceptions there lyes against Obligations, as that which for cause was given, and cause did not follow : that the cause was dishonest, for which that is challenged that was given : that the summe was not due which was paid, and therefore not to be exacted, but to be repaid : actions for things lent for a certaine time, and to a certaine use: actions for things pawned: actions that either passengers have against Marriners for the goods or ware that they have brought into the ship, or marriners have against Passengers for their fraught: actions of ejectment, wherein the passengers and Marriners are bound each to other for contribution of the losses of such things that have beene cast into the sea, in the time of a storme or tempest, according to the qualitie or quantitie of the goods they have in the ship: actions whereby masters are bound to answer for their servants contracts, and fathers for their children, in such things, or negotiation, as they have put them in trust withall, saving where the childe borrowed money without his fathers privitie for riot, and for such purpose as his father hath no use thereof : Remedies for women, when by weakenesse of their sexes, and lack of counsell, they have inwrapt themselves in suretship for other men: action of compensation, where a debt is demanded, for which an equivalent portion hath beene received in lieu

lien or satisfaction thereof, actions of mandate, or commandement, wherein one hath done some worke, or laid out some money upon an other mans mandate or word, & yet when he requireth allowance thereof, it is denied him: actions of societie or fellowship, wherein either the societie is required to be maintained, or the money put in common bank to be divided: actions of bargain and sale, either pure and conditionall, the bargain being once made, the losse and gain that after happeneth is the buyers, unless the seller retain some further right in the thing sold unto himselfe: actions of letting or setting either of the use of a person, or the use of a thing upon a certain hyer: actions of change, & such like.

SECT. 6.

That the fourth part containeth eight bookes, and the contents thereof.

The fourth part being digested into eight bookes, ministreth actions for such things as are accessarie to contracts, such as pawnes and pledges are, which are given for the better securitie of the contract: actions for restitution wherein a man hath beene deceived in a bargain, more than the halfe value of the thing sold; or wherein the seller hath concealed some fault in the thing sold, which he ought by Law to have revealed or promised some qualitie in the same, which was not in it; or where the thing sold, hath beene evicted by an other, out of the hands of the buyer, himselfe using all just defence of Law for himselfe: actions for interest and usurie, and how many kinds thereof there be that men use by land, Lucratory, Compensatorie, and Punitorie; whereof the first is altogether unlawfull, the other two allowed where either just gain ceaseth, or just losse followeth, upon that occasion, that which is lent is not payd according to the day of covenant. Sea-usurie, otherwise called nautick usurie, is greater then land-usurie, and yet allowed by Law, for that

that the seafaring man takes upon himselfe the danger of the transporting thereof, and securing the same at such place as it is appointed to be delivered. In deciding of matters of controversie, the Law proceeds sometimes by witnesses, sometimes by instruments, sometimes by presumptions, where knowledge or ignorance of fact, or Law is presumed. Spousals are mutuall promises of a future marriage: marriage is a lawfull coupling together of man and woman, the company and societie of the whole life, the Communion of all Divine and humane rites and things, and of one and the same house, wrought by the consent and mutuall good will of the one towards the other: in espousals and marriages is to be considered, who is to be joyned together, at what yeares, and by whose consent: there doth wait and attend upon marriages, Iointures, Dowries, and such like, and sometimes Divorce, which is so called of the diversitie of the mindes of those that are married; because such as are divorced, goe one a divers way from the other. The causes whereupon Divorces grow, are Adultery, deadly hatred one toward another, intolerable cruelty, neernesse of kindred and affinitie in degrees forbidden, impotencie on the one side or the other: actions of Dowrie after divorce or separation; actions against a mans wife imbeaselling away his goods; actions against a husband disclayming his owne childe; and his wife being with childe, if he make doubt thereof, means how and where she shall be kept untill her delivery, so that no false birth shall be put in place of the true childe; or that she abuse not her husband or the next heire, with a false shew of that which is not. Tutelage & government of children under age, which is either testamentarie, or due to the next of kinne, or dative, all which are either to be confirmed or disposed of by the Magistrate. Administrations of Tutors and Curators, and how farre they are endangered by their office, and wherein they are to interpose their authoritie and consent, and for what acts the pupils or minors may be sued, done by the

Divorce what,
and why so
called.

The causes of
Divorces.

tutors or curators ; how any may be argued to be a suspected tutor or curator ; and how, and by whom he may be removed, if there appear just cause of suspicion against him. A tutor is chiefly set over the person of the childe, secondly over his goods : but the Curator or Guardian is chiefly set over the goods, and then over the person of the childe. A childe (his father being dead) by the order of the Judge, is to be brought up with his mother, unlesse shee hath fled unto a second marriage, which if shee have done, then is he to be brought up with some of his neereſt kinne, ſuch as is knowne to be an honeſt man, and will have a care of his good education ; with whom the Judge is to allow him ſuch maintenance, as all his ſtock be not ſpent therein, but evermore ſomething be left againſt he come to full age. When the time of tutelage, or curatorſhip is ended, they are to render account unto the Judge, what they have received, and how they have expended the ſame, and what reſidue is left, and according as their proofes are, either by oath, or otherwiſe, ſo the Judge either alloweth, or diſalloweth the ſame. If the Tutors or Curators prove bankrupt, or unable to ſatiſſie the Pupill or Minor, then lyeth an action againſt their ſuerties for the ſatiſfaction of the ſame ; and if both of them faile, then lyeth it againſt the Judge, or Magiſtrate, if either he have not received any caution at all of the Tutors or Curators, or hath received an unſufficient caution, or unſufficient ſuerties, knowing them to be unſufficient ; otherwiſe he is not to ſecure fortune, and future caſes of the childe : the Tutors or Curators are to ſell nothing of thoſe things that are the childrens, ſaving ſuch things which by keeping cannot be kept, unlesse they have the order or decree of the Judge thereunto, which the Judge is not to decree, unlesse the childe be ſo farre in debt, that it cannot be ſatiſfied, without ſome part of other goods, or there be ſome other like juſt and neceſſarie cauſe like unto this, which may not be avoided. As Minors have Curators and Governors, ſo
alſo

also mad persons, and prodigall persons are appointed to have governors by law, for that they can no more governe their owne state, than the others can. Prodigall persons are they that know no time nor end of spending, but ryot or lavish out their goods without all discretion.

SECT. 7.

*That the fift part comprehendeth nine bookes,
and the matter thereof.*

VNder the fift Section, which compriseth in it nine bookes, are contained last wils and Testaments, and who they be that can make the same: and how many kinds thereof there be, Solemne or Militarie, and they either put in writing, or else Nuncupative: what is an unjust, or Void Will: what is to be thought of those things, which are found either to be blotted out, or interlined in a Will: how Heires or Executors are to be instituted, or substituted in Wils, and under what conditions they may be either instituted, or substituted in the same: what time an heire hath to deliberate after the Testators death, before he prove the Will: what is a Militarie Testament, and what priviledges it hath: how the inheritance may be either got or lost: how Testaments are to be opened, published, and writ out: what mens Testaments are to be opened, and published: of the punishments of such, which, a Will being extant, seeke by Administration, or some other like meanes to possesse the goods: and of those which either forbid, or compell any man to make a Will: of the power or right of Codicils: of Legacies, and bequests; as what things may be bequeathed, and what not; to whom any thing may be bequeathed; and of the signification of the words, and things which doe appertain unto Legacies: of yearely and monethly Legacies, what time they be due, in the beginning of the year, or in the end: which of them be pure, and which conditionall: of the use, profit, and benefit of any thing bequeathed: of dwelling, and workes of servants bequeathed: of Dowry
C 2 bequeathed,

bequeathed, and what profit the Legatorie hath thereby: or choise or election bequeathed: of wheat, wine, and oyle bequeathed, and what is contained under every one of them: of ground furnished bequeathed, and the instruments thereto belonging, and what is to be understood by that bequest: of store bequeathed, in Latin called *Penus*; what is comprised under that word: of household-stuffe bequeathed: of education and bringing up bequeathed: of gold, silver, womans attire, ornaments, and such like bequeathed, and what is to be understood by every of them: how Legacies may be taken away: of things that are doubtful in a Will, and how they are to be understood: of those things that are left for punishment sake in a Will, whether they be available, or otherwise: of those things which being bequeathed in a Will, are counted notwithstanding as not bequeathed: of those things that are taken away from the Legatories in the Will, as unworthy of them: of conditions, demonstrations, and causes; what force they have, and how they prevaile in a Will. Of the Law *Falcidia*, what it is, and how men thereby are restrained from bequeathing any more than three parts of their goods, so that a fourth part thereof should still remain with the heire: and if any man had received in Legacie more than he might by the Law *Falcidia*, that hee should put in band to restore that, if any unknown debt after should appear, so the same were true debt: at what day a Legacie becomes due; that is streight from the death of the Testator, unlesse it be left to be paid upon a certain or uncertain day, or under a condition; and that the heire enter into a band to pay the legacie when the day comes, or the condition happen; and if he refuse to doe it, then the legatorie to be put in possession thereof untill the day or condition happen.

SECT.

SECT. 8.

That the sixt part is spent in seven bookes, and the subject thereof.

THe sixt part spreading it selfe over seven Bookes, handleth matters of possession of goods, or Administration thereof, not growing out of the Civile Law (which onely makes heires, & giveth right of succession) but out of the Pretorian law, or law of conscience, which in equity calleth sundry to the succession of other mens goods by administration, where there is no Will, and in some cases where there is a Will, as where the Will is concealed, or the Executor renounceth the Will, but if the Will once appear, then the administration forthwith ceaseth. In cases where Administrations are to be granted, the children of the deceased have liberty to take it, within a year after the death of the deceased, and if they be further off of kin, then they have only a hundred dayes to take it in, unlesse those which are to take it are Infants, mad, deaf, dumbe, or blind, in which cases there is a longer time assigned. The Pretor granted administration not only according to the tables of the Testament, but many times even against the tables of the Testament: as where a childe is not disinherited in his Fathers Will by plain termes, but passed over with silence onely, as not remembered; or that the childe was not borne at the time of his death, & so not known whether any such child were living, or to be hoped for, or not: In which case, if it doe after appear, the Mother is put in possession of that which is the childes part. If there appear no Will, the Administration is committed in this order; First, the children of the deceased are admitted: Secondly, those that are next of kin in the Male line: Thirdly, those that are next of kin in the Female line, (which difference notwithstanding betweene male and Female at this day is taken away, and they that are next of kin are equally admitted in either sex)

Lastly comes those which have right thereto, either in that they are man or wife. The Law sundry times, where a thing is done, or intended to be done, against an other mans right, & there is provision for it in Law, yeeldeth the party grieved an Interdict or Injunction to hinder that which was intended to his prejudice, As where one buildeth an house contrary to the usuall and received forme of building, to the injurie of his neighbour, there lyeth an Injunction *de novi operis nunciatione*, which being once served, the offender is either to desist from his worke, or to put in suerties, hee shall pull it downe again, if hee doe not within a very short time avow the lawfulnessse thereof. Again, there lyeth an Injunction where hurt is not yet done, but feared to be done: as where a house is ruinous, or theeves, or any outcast worke thereof hangeth dangerously over the way, so that it is doubted it will fall & hurt some that passe by, the owner or Lord thereof is to put in suertie to the Magistrate, that if any be hurt, or miscarie thereby he shall answer for it. If any cause the water of the river, or rain-water to run an other course than before time it was wont to doe, and that the neighbours are like to be prejudiced thereby, the Law yeeldeth an Injunction; either to stay the worke that is intended, or to secure the neighbours for the hurt that is like to follow thereupon. If Customers, Collectors, or Tolle-gatherers exact more subsidie, or other like publick duties, than by Law they ought; or distrain any mans goods, upon pretence thereof, or stay in their hands such duties as they have received, whereby the partie that hath paid it, falleth into any forfeiture, or that they repair not the publick high wayes, in which respect subsidies, tributes, and other such like duties are given to Princes, they are to be punished in the double value of that which they have received, & otherwise to be fined for their ill dealing in that behalfe. In gifts which are purely given, or under a day, or condition, and specially in those that are given in contemplation of death, which are compared to Legacies themselves, a right passeth with-
out

out deliverance, and giveth sufficient matter of challenge unto him, to whom they are given. The meanes or wayes whereby the Lordship or right of any thing is gotten, be it naturall, as by the first occupying the same, by finding the same, by bringing it into a forme or fashion, by gaining by the sea or river, by delivery, or such like: or, be it by civill means, as by getting the possession of any thing by good title, and good faith, so long as it will make a just usurpation, or prescription, by holding as heire, by holding it by a gift, by taking it up as a thing forsaken, by holding it by legacie, dowrie, or inheritance, by coming to it by sentence definitive, or interlocutory, by confession of the adversary, by cession of the partie, by auctority of the Judge, and the same have been fraudulently alienated by the debtors, there lieth an Injunction to put the partie injured into possession. All Injunctions for the most part are prohibitorie, & serve either to get, or to keepe, or to recover possession, and are called commonly by the first name of the writ, as where one is denied the possession of inheritance belonging to him, an Injunction is granted him, to put him in possession, called *Quorum bonorum*; or if it be for a legacie, *Quod legatorum*; and if it be in generall cases, *Ne vis fiat ei qui in possessionem missus est*: That he that hath gotten the custodie of the Will exhibite it: that no private building, or such like, be set up in a holy and sanctified place, and if it be that it be pull'd downe again: that no Nuisance be done in publick places, or high wayes, other than such as by the Law are allowable: that publick high wayes be repaired: that nothing be done in any river, or the bankes thereof, whereby Ships or Barkes may not passe thereon: that nothing be done in any common stream, whereby the water should be forced to run otherwise this yeare, than it did the last summer afore: that it may be lawfull for every man to saile or rowe in any publick stream: that the bankes of the river be repaired. Of force, and force armed, where two are in possession of one thing, and neither of them came by the same by force, or by secret flight, or by sufferance

rance of an other, there lyeth an Injunction for continuance of either of their possession, called *uti possidetis*: That a man may use such private way, as he hath used the year past, and repaire the same without interruption of an other. That no man turne away the daily running water, or the water which falls in Summer from an other mans house, or ground to his hindrance: That water-courses in rivers, and other like places be maintained: That such as have right to draw water out of any spring, or well, be not forbid the use thereof, and that every one have free liberty to cleanse, purge, & to repaire the same, if there be any decay in it: That no man be forbid to scoure, purge, or cleanse his privies, sinkes, or vaults: That whatsoever is done by open force, or secret subtilty, be restored where it was, before such force or subtilty was done, unlessse the partie grieved release the same: That he that holds any thing at an other mans will, restore the same upon competent warning, or knowledge given him thereof: That a man may lop or cut the boughes of an other mans tree, annoying his ground, if after warning given thereof, the owner thereof do not reforme it. That it be lawfull for a man to gather such fruits of his, as fall from his own tree into an other mans ground, without any trespassse to the owner of the ground, so that he gather the same within three dayes after they are so fallen; for otherwise the law presumes he makes no reckoning of them, and fruits lying upon the ground do easily putrefie: That a man may challenge his children out of an other mans hand that holdeth them from him: That a Tenant after his lease is expired, may remove, and quietly carrie away such things from the farme, as he brought thither, so that the Rent be paid, and those things which hee brought thither, were not bound for the payment thereof. Actions are taken away, and possessions maintained by exceptions, prescriptions, and prejudices, which themselves are many times in steed of actions, as is the exception *de re indicata*, which is an exception that determineth the cause in controversy. Of Exceptions, some are perpetuall and perem-

peremptory, some are temporall and dilatory : Perpetuall and peremptory are they which evermore have place, and can never be avoyded ; Temporall and dilatory are they, which are not evermore in place , but may be avoyded : Exceptions are alleaged, either because that is done which ought to be done, or that is done that ought not to be done, or that is not done that ought to be done. Of Praescriptions likewise some are perpetuall, some temporall; the effect of either of them , is to determine the action , either in the manner of doing, or by the time when it was done, or by the place where it was done, or by some other like circumstance.

An Obligation is a bond of the Law , whereby a man is necessarily bound to pay some thing to another man: Obligations arise either out of bargains between man and man, or out of some offence that is done : Obligations by bargains , are procured either by some thing that passeth betweene the parties that doe contract , or else is effected by words, or consent. Out of obligations spring actions, which are nothing else but a right to prosecute that in judgement, which a man pretendeth to be due unto him, whereof there are two sorts ; of which , one is a challenge for right of a thing due ; the other, a suite against a person for some offence or trespasse done.

S E C T. 9.

*That the seventh part is divided into six bookes,
and the matter thereof.*

THe seventh and last part being divided into six Books, treateth of Obligations, which stand in words, and their effect: how farre two or more principall debtors are bound to the creditor in the whole, or every one for his owne part: of Suerties, and how farre they are bound, and whether the discharge of the one be the releas of the other, and by how many wayes Obligations by words are dissolved or released, by renovation, by payment, by acceptance

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of

Private offences.

of the debt not paid, as if it were paid. Of Obligations some are Civile, as those which have beene heretofore handled, some Pretorian or pertaining to the Chancery, as those whereby Tutors, Curators, and Proctors, enter into band unto a child, that his state shall be safe, that is committed to their hands: That, that shall be paid which the Iudge ceaseth: That the Plaintife shall ratifie and allow that which his Proctor shall doe for him in judgement, and such like. Criminall judgements are private or publick, that is, they are commenced either upon private offences, or upon publick faults and suits. Private offences concerne private mens revenge and injuries. Publick, the revenge or injurie of the whole state. Private offences which had ordinary proceedings, and ordinary punishment, were many, among which Theft is the chiefest, which is a deceitfull fingering of another mans goods, with intent to gaine either the thing it selfe, or the use or possession thereof; so that the mind alone maketh not Theft, but the act joyned to the minde, be the quantity never so small. Of Thefts, some are manifest, others not manifest; manifest is that, wherein the offender is taken in the deede doing, or taken before he could carrie away the thing stolne thither, whether he intended: the punishment whereof was foure double the value of that which was stolne: Not manifest, was that wherein the party offending was not taken in the deed doing, and the pain thereof was the double of that which was purloyned, or taken away. If any pilfery or theft be done in a Ship, Taverne, or Inne, the Master of the Ship, Taverne, or Inne, is to answer double the value thereof, if the same be done by himselfe, or their selves, or any of their marriners or servants: for it behoveth them to have honest men, whom they are to imploy in such services: But if it be done by any of the passingers, or guests of the house, the owners of the Ship, Taverne, or Inne, are not to answer for the same, for they cannot turne away such guests as come into their house; neither, in all likelihood, know they the quality or condition of their guests. If any man privily, unwitting the

the owner thereof, cut downe, hack, or barke any tree of any sort whatsoever, or those that are of the nature of trees, as Ivie, Reedes, Willows, so that they be spoyled, hee is to answer the double value of that hee hath cut downe and spoyled: and further, if it be a Vine-tree, to be punished as a robber. Hee that taketh any thing away from another by violence, is to be punished in the worth foure fold, for that it is a sin more grievous then theft: If any man upon any ill intent, make a tumult, whereby any hurt commeth to any man, he shall answer double of that the party is harmed in: If any, upon a burning of a house, or the fall thereof, or upon a shipwrack, or the spoyling of a boat or ship, steale any thing away, or being put in trust to keepe any thing thereof, conceale the same, he shall pay the foure double of the same; but if any man set the same afire himselfe, he is either to be cast out to wilde beasts, or is to be burnt with the same fire he went about to burne another with. If any have spitefully, contumeliously injured another man, his wife, or children, in deed, word, or writing, they are to forfeit so much as the partie greeved shall esteeme himselfe injured by, or the Iudge shall tax it at. A famous Libell is where a man hath of malicious purpose writ, compounded, or set out any thing to the infamie of another, without a name, or with a name, and the punishment thereof is death, and anciently was that hee lost the power or liberty to make a Will; the like punishment followeth him, that having found an infamous Libell, doth not by and by spoyle the same, that the knowledge thereof come not abroad, especially where the matter thereof is capitall or worthy death.

Libell what.

Extraordinary crimes, are those which have no ordinary punishment appointed them, but are arbitrarie at the Iudges appointment, such as are Sollicitors of other folkes wedlockes, and Maids chastities, although they misse of their purpose; such as of purpose cast myre, durt, or any like filth upon another, to the intent to disgrace him: such as, being with childe, of purpose cause themselves to miscarry: Such as keepe brothell and bawdy-houses, or other unlaw-

Extraordinary Crimes.

full company: Juglers, and such as carry about Snakes, and other like Serpents and trumpery to put men in feare: Such as hide and suppress corn, to cause the price to be dearer: Such as either make, or use false weights wittingly; for all which, because there is no proper punishment provided in the Law, they are referred to the punishment of the Judge, who is to punish them according to the quality of the fact, age, and understanding of the offender, and other circumstances according as he shall thinke good; so, notwithstanding that he exceed not a convenient measure therein, neither stretch the same to death, but upon some great and weighty cause, he is to be content with meaner punishment, as temporall banishment, whipping, or some moderat pecuniary mulct. For violating or defacing another mans sepulchre, Infamy was imposed, besides a pecuniary mulct to be divided betweene the Prince and the party grieved, but if any dig up the corse of the deceased, the punishment is death. If any, by feare of his office or authority, wring any money from any man, or exact more fees in any matter than he ought to doe, or cause him to marry, or doe any other thing he would not doe, the forfeiture is foure double the value of that which hath been taken, beside further punishment at the discretion of the Judge. Such as drive mens cattell out of their ground, or sever them from the flock or herd, with intent to steale them, if they doe it with a weapon like unto a Robber, are condemned to be throwne to wild beasts, otherwise are more lightly punished according to the discretion of the Iudge. Such as in judgement take money on both sides, or taking upon them the defence of one side, betray the cause, and take money on the other side, are infamous by law, and are punished at the discretion of the Iudge. Such as receive theeves, and other like malefactors, are punished in like sort as the theeves or malefactors themselves are; especially if they have assisted them in their wickednesse: otherwise if they onely knew it, & received them, they are more mildly to be punished, especially if the offenders were their kinsmen: for, their offence is not like theirs,

theirs, which entertaine those which are no kin to them at all; when as it is naturall for every one to regard his owne bloud: and fathers are many times more carefull for their children, than for themselves; but if that hee that received them knew nothing of the offence, then is he altogether to be excused. Such as break prison, are to be punished by death, because it is a certaine treason to breake the Princes ward, but if they scape by the negligence of the Keepers, against whom the presumption lyeth ever in this case, they are more lightly to be punished. If any commit Burglarie, breaking up a doore or wall, with intent to do a Robbery, if they be base companions, they are to be condemned to the Mynes or Gallies; but if they be of better reckoning, they are to be put from the ranke or order wherein they are, or to be banished for a season. Juglers and like Impostors, which goe about deceiving of the people with false tricks and toyes, hooks and such like, which insinuate themselves into other mens houses, with purpose to steale, are punished at the discretion of the Iudge

If any steale, or take away any thing out of the inheritance of another man, before either the Will be proved, or administration be taken; an action of theft lyeth not, because the inheritance, during the time, was counted no bodies, but he is to be punished by the discretion of the Iudge; yea, though it were the heire himselfe that did it. Cosenage, whereby a man craftily suppresseth some thing he should not, or putteth one thing in anothers place, to the deceit of him that hee dealeth withall, or corrupteth such wares which hee uttereth, or doth any other thing collusorily, which is called of the Law *Crimen Stellionatus*, (of a little vermin or creature called *Stellio*, much like to a Lizard, most envious to man) is censured by some ignominious & shameful punishment, or by disgracing the person, by putting him out of the Office, Place, or Order he is in, or by injoyning him some servile worke, or by banishing him for a time, or by some like punishment, at the discretion of the Iudge. If any plough up a Mete balke, or remove any other marke

which hath accustomed to be a marke or bound betweene ground and groundes, which anciently was counted reverend and religious among men, the offence is punished either by a pecuniarie mulct, or by banishment, or whipping, at the discretion of the Iudge. Unlawfull Colledges, Corporations, and assemblies, gathered together to bad uses, as to eating, drinking, wantonnesse, heresie, conspiracie, are punished as publick Routs or Riots, otherwise at the discretion of the Iudge: All these, before recited, are called Popular Actions, because, not onely he that is injured, but every other honest subject may pursue and prosecute the same.

publick Judgement.

Publick judgements are such, which immediatly pertain to the punishment of the common-wealth for example sake, and are examined, tried, and punished by a publick order appointed by Law, the partie grieved, making himselfe partie to the suite, and following the same; the party accused in the meane while remaining in prison, or putting in sureties for his appearance, and the partie grieved for the prosecuting of the same. The chiefest of which sort is Treason, which is a diminishing or derogation of the Majestie of the people, or Prince, on whom the people have collated all their power, which is punished with death, and confiscation of the Lands and goods of the offender, and the eternall abolishment of his memorie. The next is Adultery, which is violating of another mans bed, whose punishment anciently was death, both in the man and in the woman, but after it was mitigated in the woman, shee being first whipt, and then shut up in a Monasterie: but by the Canons other paines are inflicted. Under Adulterie are contained Incest, Sodomy, Baudery, and all the rest of the sins of that kinde. Publick force, is that which done by a company of armed men, collected together, and the correction thereof is perpetuall banishment. Private, which is done without Arms, the paine thereof is the losse of halfe the parties goods, and the infamie of his name. Murtherers and Poysoners, Witches and Sorcerers, the crime being proved,

proved, dye the death : such as set mens houses a fire, are to be consumed with fire themselves : such as kill either Father or Mother, or those that are in the place of Father or Mother, or any that are of next a kin, their punishment is death; and in case of the Father and Mother, beside the pain of death, the Parricide being first well whipt, so that the blood doe follow in good plenty, hee being sowed up into a sack, together with a Dog, a Cock, and an Ape, is thrown into the depth of the Sea. Such as make false Certificates, forge false Wils, Depose false wittingly, suborne witnesses, take money either to say, or not to say their knowledge of that which they are demanded of in judgement, corrupt judgement, or cause it to be corrupted, interline, put in, or raze out any thing out of any writing, that the truth thereof may not appeare as it is written, suppress Wils or Testaments, or other like writings, counterfeit other mens hands and Seals, open any mans Will yet living, and impart the secrets thereof to the parties adversarie, unseale such instruments or writings, as are left with him to keep; bequeath unto themselves Legacies in another mans Will, without his good will and privitie; wash or clip gold, or sowder therein any corrupt mettals, make base silver money; pretend themselves to be Noble men or Gentlemen, whereas otherwise they are but base persons; wilfully challenge unto themselves another mans name, or Arms; cog and foist in womens labours or otherwise, false births, or adulterous children, instead of true and rightfull heires; sell one and the same thing to two men, carrie about false Passports; use false Measures, or corrupt those that are true, in some cases, are punished by death, in other by banishment, imprisonment, or cutting off both or one of the hands of the offender. If any bearing any publick office, abuse the same to gain, and doth that for money, which he ought to doe for thanks, the Law ordereth, that the offender shall be called to account for his supposed bribery, and if he be found guilty thereof, fineth him foure fold to the party grieved, and beside, decreeth him to be banished.

Such

Such as by ill devises and policies, raise up the price of corne and other victuall, or get the whole sale of any merchandise into their hands, that they may sell it the dearer, are punishable at the discretion of the Judge, which according to the quality of the person and fact, reacheth sometimes to banishment, sometimes to death it selfe. If any take, purloine, or intervert to his own use any money dedicated to holy and publick uses, or cause the same to be taken, purloyned, or interverted; or if any take away any brasen table, wherein any publick Lawes are graven, or the bounds of any Lands are described, or blot out, or change any thing thereof, or covenantously pay in lesse money into the Exchequer, than by right he ought to have done, and hath not cleered with the Exchequer for the residue, he is to be condemned in the three double of that which is the residue, and is beside to be banished.

If any, to get an Office, procure a number of hired voices, besides the losse of the Office he sueth for, his punishment is temporall banishment. If any steale away any childe, the body of any free-man, and sell the same away, or detein them against their will, the fault is death. If any slanderously charge another with any false crime, or wittingly beare any false witnesse against him, or willingly give any wrong Sentence against him, or on the contrary side, dissembleth such faults as he knoweth, and colludeth with the adversary, or giveth over the prosecution of a crime hee hath undertaken to follow, untill he have leave granted him by the Judge, to desist from his accusation, the same is to be punished with the like kinde of punishment, that he would have the other punished by, unlesse he be acquitted therefrom by the Princes pardon; or that the Adversarie be dead. In publick judgements where the Offender appears not, Proces is to be awarded out against him for his appearance, by a certaine day to cleere himselfe; at which day if he appeare not, an Inventory is taken of his goods, not to the intent they should be spent, but that they should be reserved to his use, if hee returne againe within

within a year, and cleare himselfe; otherwise they become the Exchequers for ever, how innocent soever the party afterwards appears to be. If the Offender be present in Iudgement, and deny the fact, he is to be confuted by witnesses, or other prooffe; or if there be just matter of suspition, to be put on the rack; which, albeit in matters of lesse danger, is great cruelty, yet in great and horrible crimes it is necessary: If the Offender have either confessed the crime, or be convicted thereof, then it followeth, that the party convicted, be punished either by death or otherwise, according to the quality of the person, or condition of the offence. Punishments by death are foure, Hanging, Burning, Heading, and casting the Offender to be devoured by wilde beasts, amongst which may be reckoned, Exile or Banishment, for that it takes away a mans liberty, and bereaves him of his country, which to every good subject, is as dear unto him as his life it selfe.

Punishments which did not inflict death, were many, & such as it pleased the Magistrate in his discretion to appoint. The Law having passed upon the Offender in such sort, as should be to the losse of his life, liberty, or countrie, his goods became forthwith forfeited to the Prince, such (I mean) as are of value: but for the other, the Law alloweth them the prisoner, for his maintenance during the time of his imprisonment, and satisfying such fees as are due to the Officers thereof; which hath place where the offender hath no children, otherwise the one halfe of his goods cometh to his children, unlesse it be in case of Treason, where all is confiscated. They are also held for convict and guilty, which either upon a guiltinesse of minde make away themselves before Iudgement, or stop their Adversaries with a bribe, that they shall not follow the Law against them, and their goods are no lesse confiscat than the others. But it is otherwise in those which are banished for a time, or to a certaine place, or in such as the Law having once passed upon them, are either in their life, or after their death, by the bounty and mercy of the Prince restored; in

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which

which case they recover Goods, Name, and Honour: the body being executed, the carcase, for the most part, is granted to buriall, unlesse it be for matter of Treason, or other such like offence. If any have beene unjustly condemned, either by the iniquity or unskilfulnesse of the Iudge, the Law alloweth him an appeale, that is, a provocation to a higher Iudge, that he may hear the cause anew, and reforme that which is judged amisse into better: and if the higher Iudge finde the partie grieved hath well appealed, he is to reverse the former sentence, otherwise to send the Offender back to the Iudge, from whence he came, there to receive his punishment: yet some persons there be, from whom to appeale lyeth, as from the Prince, or Senate, because they represent the Prince; neither may hee appeale, which hath renounc'd his appeale. Appeales are made from lower Iudges to higher, and from him that is Delegated, to him that did Delegate: Appeales are to be made within ten dayes after sentence given, or within ten dayes after the Notice is to come to the party against whom the Sentence did passe, unlesse there attend thereon a continuall grieve, in which case, a man may appeale so long as the grieve indures: the time to aske Dimissorie Letters, is thirty dayes from the Sentence given; the time to present the same to the Iudge, is at the discretion of the Iudge from whom; the time of prosecuting the same is a yeare, or, upon a just cause, two yeares; in which time if the sute be not ended, the cause is deserted, and to be sent back unto the Iudge, from whom the Appeale was first made: while the Appeale hangeth, nothing is to bee innovated, because by the Appeale, the Iudges hands are, as it were, bound: but if the former Sentence were voyde by law, (as in sundry cases they are) then there needeth no Appeale; for such Sentences never passe into a case judged. Appeales in criminall cases, cannot be justified by a Proctor; but it is otherwise in Civile Causes. An Appeale in one cause doth not exempt the party appellat from his owne Iudge, in other causes: If the appellat die during the time of the Appeale, and leave no heire

heire behinde him, the Appeale ceaseth; but if he leave an heire behind him, and the matter of the Appealle concerns none but himselfe, he is not to be compelled to follow it, for every one may renounce his owne sute: but if it concerne the Exchequer, or any other body, then may hee be compelled to follow it.

The Exchequer is the Princes Treasurie, and the patrimony of the common-wealth, and hath many and singular prerogatives, which private men have not. Such as are taken captive by the enemy, become their servants, who have taken them, unlesse either they escape home again themselves, or be ransomed by their friends; in both which cases, they recover all right and priviledges they had in their owne common-wealth before. By the Law, all Subjects whatsoever, are bound to serve the common-wealth in warre: in so much that if any, being prest, withdraw himselfe, or his childe from it; he is to be counted as a rebell, and for his punishment is to be banished, and mulcted or fined in the greatest part of his goods. As the priviledges and rewards of Souldiers were many to encourage them to vertue and manhood; so their shames and punishments were great, to feare them from cowardice and vice: But among the rest of the priviledges of Souldiers, the old Souldiers were the greatest. Of Subjects, some dwelt in Shires, and lived after their owne Lawes, and yet nevertheless were made partakers of the honours of the Citie: some other were inhabitants only in the common-wealth, and had onely a house in the same place to dwell in, and had no right to bear office: some other were strangers brought in, which were ruled by the Law of them among whom they dwelt. Amongst those that dwelt in Shires, the chiefest Magistrate was he whom they called *Decurio*, who was not sent by the people of Rome thither (for he was a Magistrate of Magistrates) but elected by the people there; and his office was, to keepe the treasurie of the Countrey to provide victuall, exact tribute, & govern the state there, in manner as our Shrifes do here: His office was onely

annual, lest by liberty, and lust of government, and continuance thereof it might grow into tyrannie. Such as are Subjects, are to serve the common-wealth in such offices, places, and services, as their abilitie is fit for, and the necessitie of the common-wealth requires. The services of the common-wealth were of three sorts; Patrimoniall, such as belong to every mans patrimony to performe, which stood chiefly upon payment and charges, which were to goe out of every mans inheritance towards the performance of such burthen as lay upon him by law, custome, or command of him that had power thereto: Personall, which were to be performed by the care and industrie of the partie and his corporall labour, without expence of his purse. Mixt, which required both care of the minde, and labour of the body, and expence of the purse, and are imposed as well in consideration of the thing, as the person, which every subject^{was} to undergoe, unlesse by the Law, or by the indulgence of the Prince they are excused; as some are excused by reason of old age, some by young age, some for their dignity, some for their calling, some for their state of body, some for that they serve in the necessarie services of the common-wealth at home, or abroad, as Embassadors do, some for that they are in necessary places of services for Gods Religion, as cathedrall Churches, and other Churches are; some for that they are of good and necessary places for Seminaries for the common-wealth, for learning and such other imployments, as Colledges, Societies, and Schooles of learning and nurture are. Legates and Embassadors had immunitie from all publick services, not onely the time of their embassage, but also two years after their returne; They were called Legates, in that they were chosen as fit men, out of many; their person was sacred both at home and abroad, so that no man might lay violent hands on them without breach of the Law of Nations. Such as are Magistrates of Cities ought so to governe, that no negligence may bee justly imputed unto them, otherwise they are to answer it, and that when their
their

their office is expired, they give up a just account, both of what they have received, and what they have layd out, and pay in the residue, if there bee any. Governours of Cities, together with the consent of the Burgeses thereof, may set downe such orders and decrees, as are for the benefit and well ordering thereof, which are to be observed of all those which are Inhabitants thereof, and being once well and duely set downe, are not to be reversed, but to the good of the City or Commonalty. New publick workes, such as are good for the Common-weale, every one may make without the leave of the Prince, unlesse it be done for æmulation, or cause of discord; but for old works, in which stands the security of the Common-wealth, as Castles, Towers, Gates, and Wals of Cities, nothing is to be done or innovated in them, without the Princes warrant; neither is it lawfull for any man to grave his name in any publick Worke, unlesse it be his, at whose cost the worke is done. Faires are authorized by Princes onely, and are invented for trade of merchandize, and uttering of wares, which Country-men have cause to buy, or sell: and have their priviledges, that no man in any Faire can be arrested for any private debt; they were called *Nundina*, because that among the *Romans*, they were anciently holden in one place or other upon every ninth day. Hee that for ten yeares space intermitteth to use his Faire, loseth the priviledge thereof. If any make any promise to a Citie or Common-wealth, to do any thing upon certain cause, as that hee might be made Consul, or that he would repair some part of the Citie that was burnt, he shall, by the Law, be compelled to performe his promise; for it is not meet that such promises should be satisfied with repentance. Such as professe liberrall Sciences in any Common-wealth, whereby youth is instructed, & brought up to knowledge, or be School-masters, or Professours of Physick, or be Midwives, Notaries, Auditors, or Callers of accounts, or Registers, the Law alloweth, not onely a competent stipend in recompence of their skill & paines, but also affords the means, how the same may be

recovered if it be denied. But as for Philosophers and Lawyers, the Law hath appointed them no stipend, not because they are not reverend Sciences, and worthy reward or stipend, but because either of them are most honorable professions, whose worthinesse is not to be valued or dishonoured by money: yet in these cases many things are honestly taken, which are not honestly asked; and the Judge may according to the quality of the cause, and the skill of the Advocate, the custome of the Court, and the worth of the matter that is in hand, appoint them a fee answerable to their place, as also to such as are Interpreters between parties in matters of traffick, when one understands not another's language.

CHAP. II.

SECT. I.

*The second Volume of the Civile Law, is the Code,
which is distributed into twelve Booke.
why the Code is so called.*

THe second Tome of the Law, is the Code, and stands in twelve Books, wherof eight, for the Titles, follow in a manner the order of the Digest, a few titles onely excepted, which are added, besides those of the Digest; but as for the foure other, which are the first, the tenth, the eleventh, and the twelfth; although the subject they treat of be named in the Digest; yet the things which are there named, are not handled in the Digest; and therefore will I passe over those eight other, lest happily I might seeme to doe one thing twice, and therefore will I referre the Reader over to that which hath beene said of them before, in the handling of the Digest; for they are almost twinnes of one mother, so that whosoever knowes the one, shall with no great difficulty discern the other, and

and come to the other foure; yet not mentioned there: But yet before I lay open the matter thereof, I will in a word or two shew why this Volume of the Law is called the Code, who is the author thereof, and out of whom it was collected, what moved the author, after so many learned titles set downe before, of such things as are in the Digest deduced, by such a number of worthy Lawyers (as the Lawes of the Digest themselves doe by their inscriptions shew; for every law carrieth with him in his forehead, the name of his Author) to make a new flourish of the same, and what the knowledge of the Code doth conferre unto a Student or practiser of the Law, more than the knowledge of the Digest doth.

The Code therefore is named of the word *Caudex*, that is, the trunke or timber of the tree, from which the barke of the tree is pilled or pulled off, of which men anciently used to make writing-tables, artificially binding them up into the forme of a booke, and using them for bookes, before the use of paper or parchment was knowne; inso-much, as many of these tables being bound together, they were called a Code, or booke: besides, whereas the ancient Lawyers before *Justinians* time, used to write their pleas and answers in scrowles of paper or parchment, *Justinian* himselfe first put them in a booke, and therefore termed them by the name of a Code. *Why this Tome of the Law is called the Code.*

The Code it selfe is compiled of the answers of 56. Emperours, and their wise Councell, whereof sundry were learned and skilfull Lawyers, as the storie of that time doth shew, and the lawes themselves doe name some of them, as that most excellent and famous man *Papinian*, and some others; that is, from the dayes of *Adrian* the Emperour, unto the age of *Justinian* himselfe. *What the Code is.*

The cause that moved *Justinian* hereto, was, that in the Digest hee found not every case decided, that falls out in common use of life (for how is it possible, when as every moment there falls out new matter, for which former lawes made no provision?) and therefore thought good to supplie *The reason which moved the Emperour to compile the Code.*

plie that by new Lawes, which be found defective in the old: so that the multiplication of those titles grew not, that the Emperour had any meaning, to fill the world with multitude of Lawes, for he had found the inconvenience thereof already, and therefore had repealed and abolished so many thousand of old lawes, as he had; but it came rather of that, that the multitude of causes were so many, that every day there fell out some unexpected thing that was never heard of before: beside notwithstanding the carefulnesse of the Emperour himselfe, and his great Lawyer *Trebonian*, and others, whom he used for the selecting and choosing out of the purest, best, and most agreeing Lawes among themselves, out of that indigested heap of Lawes he then abolished; yet they were not so quick sighted, but in that great worke, sundry *antinomies* or contrary Lawes past them, which had need to be expounded and amended, and the Authors to be recited. Further, sundry of ancient Lawes were so subtilly written, that there was more wit than profit in them; so that it was expedient, the Emperour should explain the same, & putting all subtilty aside, give a right sence unto the Law. Lastly, whereas many things were delivered by them briefly, and therefore obscurely, the Law-giver in his Princely wisdom, set out the same in other Lawes more plentifully and distinctly, all which were the chiefest causes, why the Emperour set out the booke of the Code.

*The difference
between the
Digest and the
Code.*

The Code neither in style, nor in methode cometh to the perfection of the Digest, as that which for the style is a barbarous Thracian phrase Latinized, such as never any mean Latinist spake; whereas notwithstanding the style of the Digest is very grave and pure, and such as doth not much differ from the eloquentest speech that ever the *Romans* used; and for the methode, it hath no particular disposition, other than such as is borrowed of the Digest it selfe, and otherwise is rude and unskillfull, where it doth recede from the same: yet doth it not lack his good use, for to such as follow the practise of the law, the knowledge

ledge of the Code is much more expedient than the knowledge of the Digest is, for that the lawes of the Code doe determine matters in daily use of life; which because they are alike in all ages (for the same is evermore upon the stage, the persons a little altered) it cannot be but the learning thereof must be very profitable and expedient for the Common-wealth, whereas notwithstanding the learning of the Digest stands rather in discussing of subtile questions of the Law, and enumerations of the variety of opinions of ancient Lawyers thereupon, which have more commendations of wit, than benefit toward the Common-wealth in them; but hereof hitherto.

S E C T. 2.

The Argument of the first Booke of the Code.

THe first Booke of the Code treateth of Religion, and the Rites and Ceremonies thereto belonging, whereof I said there was no speciall Tractate in the Digest, saving that it divideth the publick right into that which concernes the Church, and Church-men, and the Magistrates of the Common-wealth, prosecuting the later branch thereof onely, and omitting the first, because out of that Heathenish Religion, which was used in those ancient Lawyers dayes, and those superstitious Rites, whereof their Bookes were full, nothing could be taken that might serve for our Religion: whereupon he instituted a new discourse thereof in the Code, beginning first with the blessed Trinitie, one in essence, and three in person, wherein he sets downe a brieve summe of our Christian faith, agreeable to the doctrine of the Prophets, and Apostles, and the foure first generall Councils, the Nicene, Constantinopolitan, Ephesine, & Calcedon, forbidding any man publickly to dispute, or strive thereabout, taking occasion upon the Nestorian heresie, which not long before had sprung up, and had mightily infected the Church, which *Justinian* by this confession of Faith so published to the whole world, and a penall Edict

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joyned

joyned thereunto, hoped to repress: After hee hath set downe a full and sound confession of the Christian faith, conformable to the Primitive Church; next hee addeth a title of the holy Church it selfe, and of her priviledges, which either concerne Ecclesiasticall mens persons themselves, or their state and substance, or the actions one Ecclesiasticall man had against another, or with, or against Lay persons: where also he prosecuteth the degrees of Priests, or Ministers, their offices, orders, and how the same are to be come by, (that is, without bribes or Simonie, or other worldly respect, save the worth of the person onely) and the right of holy places. [Priests in the Law are called, from the Latine *Sacerdotes*, either because their office was *Deo sacra dare*, to sacrifice to God; or else, because they were consecrated, and as it were, severed from the rest of the people, and given up to God: they were also called *Elders*, answerable to the Greeke *Πρεσβυτεροι*, either for that they were so in age, * (the Law having provided, that no man should be promoted to the dignitie of a Priest, till hee were 35 yeares old) or else, because they ought to be such in manners and carefull carriage of themselves.] Amongst Priests or Ministers, Bishops have the first place, who are, as it were, the † Overseers and Superintendents of the rest, so called of their watchfulnesse, care, labour, and faithfulnessse in teaching the people; and doing other duties which they owe unto the Church. [The lowest degrees of men in the Ecclesiasticall Hierarchy, were the Clerkes, as the word *Clericus* is restrin'd to a narrower acception. For in the generall, it is most properly applyed to all degrees of the Clergie, and is a terme contradistinct to the Laitie: and they are called Clergie, from the Greeke *Κληρικοι*, *quia de sorte Domini sunt, vel quia Dominus sors est, & pars Clericorum*, either because God is their portion and lot, or because they are his; as *Papias* hath observed.] To Bishops, Priests, and other of that ranke, did appertain the care of Hospitals, whereof some were for Orphans, some for Infants, some for impotent and diseased persons, some for

* In Authent.
de sanct. Epi-
scop. S. Presby-
terum, Collat. 9.

† *Επισκοποι*.

for poore people, some for strangers, and other like miserable persons ; and therefore together with the title of Bishops and Clerks, is joyned the title of Hospitals, or Almshouses. In place next after the Bishops themselves, comes their power and audience ; for albeit the chiefest office of a Bishop, is to instruct the people in the doctrine of the Word, and in good example of life : yet forasmuch as all will not be obedient unto the Word, neither brought by the perswasion thereof to good nurture, and to be kept in order, and the eminencie of the degree, wherein the Bishops are placed, is not sufficient to keepe the people in obedience without some power and jurisdiction ; and because the Church it selfe is the mother and maintainer of Justice, therefore there is by the Emperour himselfe, and his predecessors, as many as professed Christianity, certain peculiar jurisdictions Ecclesiasticall, assigned to the Bishops, more worthy than the Civile, over persons and causes Ecclesiasticall, such as touch the Soule and Conscience, or doe appertaine to any charitable or godly uses : and over the Laitie, so farre forth, as either the Laitie themselves have beene content to submit themselves unto their government, that is, so farre as either it concernes their Soules health, or the outward government of the Church in things decent or comely, or that it concernes poore and miserable persons, such as widowes, orphans, captives, and such other like helpleffe people are, or where the Civile Magistrate cannot be come by, or doth voluntarily delay judgement ; in all which, anciently a Bishop was to performe double faith and sanctity ; first of an uncorrupt Judge, and then of a holy Bishop. But in many of these matters in these dayes, the Laitie will not suffer themselves to be controll'd, and therefore hath taken away most of these dealings from them, yea, even in charitable causes. Immediately followeth a title of Hereticks, Manichees, Samaritans, Anabaptists, Apostates, abusers of the Crosse of Christ, Jewes, and worshippers of the host of heaven, Pagans, and of their Temples and Sacrifices ; whom the

Bishop is not onely to confute by learning, but also to suppress by authoritie, for he hath not the spirituall Sword in vaine. The Hereticks, Iewes, and Pagans shall not have Christian men and women to be their servants: that such as flie to the Church for Sanctuarie, or claime the ayde thereof, shall not be drawne from thence, unlesse the offence be haynous, and done of a pretended and purposed malice, in which case no Immunity is to be allowed them, but wicked people are to be punished according to their desert, agreeable to the word of God it selfe, which would not have his Altar to be a refuge unto the wicked: And so farre of that part of publick right, which appertaineth to the Priests, or Ministers, and their Function, which was omitted in the Digest, but prosecuted in the Code. Now it followeth, that with like brevity I run over the three last Bookes of the Code, which themselves were rather shadowed in the Digest, in the title of the right of the Exchequer, than in any iust proportion handled.

S E C T. 3.

The Argument of the 10. Booke of the Code.

THe first therefore of them setteth out, what is the right of the Exchequer, and in what things it standeth, as in goods excheted, because there is no heire unto them, or that they are forfeited by any offence worthy death, or otherwise. How such as are in debt to the Exchequer, and their suerties are to be sued. Of the right of those things which the Exchequer sels by outcry, where he that offereth most, carrieth it away, and how the same may be revoked, unlesse all rights and ceremonies be solemnly performed therein. How things that are in Common betweene the Exchequer and private men, may be sold, and that the Exchequer evict nothing that it hath once sold, for that it were a thing against the dignity of the Exchequer, and would terrifie private men for bargaining with it. Of those that have borrowed money out of the publick receipts,

ceipts, and what penalty they incurre, if they repay it not at their dayes covenanted, somtimes the forfeiture of foure double of that they have borrowed, somtimes danger of life it selfe. That in cases of penalties, the Exchequer be not preferred before such as the Offender was truely indebted unto, but that they be first served, and then the Exchequer have onely that which is left. What usurie the Exchequer may take, that is, for money lent, and not for such summes as grow out of Mulcts and Penalties. That such sentences that are given against the Exchequer, may be retracted within three years following, although ordinarily all other Sentences are irrecoverable after ten dayes; neither can be reformed after that time, either by rescript of the Prince, or by pretence of new prooffe. Of the goods of such as excheat, by reason they have made no Will, and of the goods of Incorporations, that is, of such as dye without heires, that they come not to the common banke of the citie, but that they excheat unto the Prince: Of Promotors, by whose informations any goods are confiscate, either by reason of the goods themselves, for that they are adulterine, or that they are prohibited to be exported or imported, or upon some other like cause, or by reason of the persons that have offended, and crimes wherein they have offended; and their punishment, if they give in any wrong information, or other than such as they are bound unto by vertue of their Office: and that they give no information in, but by advise of the Attourney of the Exchequer, and that they make no information against their Lord and Master, but in case of Treason. That it shall be lawfull for no man to make sute unto the Prince for those things that are confiscated unto the Exchequer, as though it were more honourable for the Prince to bestow such things on his Courtiers, than to keepe them to himselfe: and therefore such as are the Princes Secretaries, his Masters of Requests, and others that are of his remembrance, are forbidden to make any Acts, Instruments, or other writings hereof, unlesse the Prince of his owne motion, and at no other mans sute, will

or command the same: Of such as put themselves into the Exchequer, upon any confession made against themselves: Of such, to whom the Prince joyntly hath given any farme or like thing, that where one of them dyeth without an heire, the other may succeed him: Of Treasure found, that the Exchequer be made acquainted with it; and that if it be found in a publick place, halfe goeth to the Exchequer, the other to the finder: but if it be in private place, then halfe to the Lord of the soyle, and the other to the finder: Of provision for Corne, and such other like: Of Tribute, which was an ordinary payment: Of imposition and super impositions, which were payments laid upon the subject above ordinarie tax, for some present necessity, to which charges, the ordinary tax doth not suffice; which was not to be done, but upon great and urgent cause, by a Councell called together, and with the consent of the subject: Of Collectors of the Subsidies, and in what manner they are to be collected and brought into the Exchequer, and of the punishment of those that in the collection thereof extort more than is due: that it shall be lawfull to distrain from Tribute unpaid: that such acquittances as the Exchequer shall deliver unto the accomptants, shall be their full and finall discharge: and that the Subsidie Bookes shall every quarter be sent up into the Exchequer with the account of the Collectors, that thereby it may appear how much every man hath paid or oweth unto the Exchequer: and that nothing may be done for the grievance of the poore, or the favour of the rich: Of the Booke of accounts of yearly gifts that commonly Subjects present unto the Prince at New-years-tide and otherwise, and that they be divided from the accounts of the Exchequer: That no man be freed from the payment of Tribute: Of spending out such ancient gain, and other like provision, as is laid up in the common store-house, and making provision for a new, and compelling the subjects, such as have plenty of such grain, if it happen to be vined and mustie, to buy the same, that the whole losse thereof may not lye upon the Exchequer:

Exchequer: What pension such Mannors as the Prince hath given or released from payment of Subsidies shall give, and that no man be so hardy to beg such a matter of the Prince, lest the revenues of the Exchequer be thereby diminished: Of Mannors that have beene translated from the payment of one kinde of provision to another, or that have beene in their taxation over-rated: Of Brasse that Minerall Countries are to yeeld, or money in lieu thereof: Of Controllers, whose Office it was to cast over againe such accounts as were brought into the Exchequer, or to examine them a-new, lest perhaps there might be an error in them.

And so farre as concerning those things which doe appertain to the account of the Exchequer, or the patrimony thereof, or such pensions or payments, as are due unto the same. Now followeth the other part of this tenth Booke, which containeth the burthens, duties, or offices imposed on the subject by the Exchequer, and what excuse the subject might alleage in this behalfe.

Burthens or duties, were either personall, as places of Honour, which were not to be continued from the father to the childe; or they be Patrimoniall, which are charged upon mens inheritance, either for the good of the commonwealth, or to enrich the Exchequer against dangers that are like to ensue: which are undertooke and performed either by those which are of necessity to obey that which is enjoyned them, or by those which offer themselves voluntarily thereto, which seldome happeneth in patrimoniall charges: but in matters of Honour and personall services, it many times commeth to passe, that men excuse not themselves from bearing of Offices, or doing of personall services, although they have an immunitie from them, either by the grant of the Prince, (which is to be understood of extraordinary service only, and not of ordinary) or by the benefit of the Law; for by the Law men are many times upon just causes excused from Personall services, so it be not from such services as no man can excuse himselfe from; such as Postings and carriages, when the Prince passeth

passeth by, or the Tenure of his Inheritance doe so require it, and the erecting and repairing of Bridges, Wayes and Wals, the provision and carriage of Corne, and other like kindes necessary for the maintenance of the Princes house. Men are excused either generally from all kindes of services, or particularly from some : as all Minors, specially such as are Students in any famous University, whilest they give themselves there unto their booke, are excused from all Personall services, but not from Patrimoniall services ; as also all old men of the age of seventy yeares and upward, all Professours of Liberrall Sciences, whereby the Common-wealth is benefited, all Professours of Physick, Grammar, Oratorie, or Philosophie, so they be allowed by the Magistrate, and seven skilfull men, in the profession which they make shew of, and be not *Supernumerarii*, or above the number of those that are to be allowed, in which number are neither * Poëts nor † Auditors : which are also excused, which upon just cause are dismissed, either out of the Army, or out of the Schooles, either for lack of health, or that they are so wounded, that they can never serve in warre any longer, nor longer indure studie, which are so to be understood, that they yeeld excuse from Personall services onely, and not from Prediall.

* Poëta nullâ
immunitatis
prærogativâ ju-
vantur. Cod. de
Professorib. l. 3.
lib. 10.

But the Inter-
pretation is
more mercifull
than the Text.
For the Glosse
saith, Poëta hoc
ipso quòd Poëta
immunitatem
non habent, non
quòd eam Divi-
ni Spiritus non
mereantur, sed
quòd lex deficit.

† The Law hath it : *Non etiam Calculatores* l. 4. *De Proff. & Med. lib. 10. Cod. And ff. de Excu: Tut. l. Σπάδοντα Μηδὲ χαλκευαίτορας* (ὅς διαψήφισαὺς λέγεται) ἔχειν ἀλειττεργησίαν λέγουσιν αἱ δεῖαι διατάξεις, where the Law expoundeth *Calculatores* by διαψήφισαὺς, that is, saith Briffon and the Glosse, *Qui artem numerandi docent* : answerable to that which *Cujacius* hath noted out of the βασιλική. Οἱ ψήφίζον ἡμᾶς ἐκδιδάσκοντες, and then it may be thought, that the Law heere meaneth by *Calculatores*, those that taught to cast an Account, Ciphering-Masters.

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passage were into places beyond the Sea, or into any farre country, not if it were into any country neere at hand. Skill in any Manuall Art or Mysteries, to the intent that they may have both time to learne their Arts, and so become the skilfuller in the same, and also have more alacrity to teach others in their Mysterie. That care be had, that such bee chosen to office, that be of the worthier sort for their vertue and place, and the richest for their state: that no man be chosen to office for envie, and if any be, and the same be proved, he that did chuse him thereto is to be fined, and to pay the expences of the sute, unlesse he which is chosen die within a short time after the choise, then his successors are not bound thereto. Further, men are excused, if being in one Office, they are chosen unto another, to the intent, they may the better execute and performe that office they have in hand: Such as are Remembrancers, which make Bookes of what is due to the Exchequer, and what is brought in, Auditors, Receivers, Tellers, Granarers, Weighers, such as weigh and try such gold, as is brought and paid into the Exchequer; Collectors, that is, such as gather up the gold that is due in the Provinces to the Exchequer, and send the same over into the Exchequer, who are in no case to hold the same longer in their hands than the Law alloweth them, much lesse to turne the same to their owne use, without great offence to the Prince and common-wealth: the like is for a Crowne of gold, that is, of such gold that is put in Crownes, and offered to the Prince upon any publick gratulation, or any exployte that hath beene happily atchieved.

Justices of Peace, which are distributed by countries, for the more quiet and peaceable government of the same, whose care was to seeke out theeves and malefactors, and to fore-see that the country-people did make no mutiny, by reason of the Taxes and Subsidies that were levied upon them: that for gold, there might be paid silver; and again, silver for gold into the Exchequer, so that the value thereof were made equall. Usurers, although they have no pos-
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sessions, yet they are no lesse bound to all Patrimoniall or Prediall charges, than if themselves had Lands and Hereditaments, although, for their infamie, they are excluded from all Personall charges that are of credit.

S E C T. 4.

The Argument of the 11. Booke of the Code.

THe eleventh Booke proceedeth in the enumeration of other vocations, that are exempted in personall services of the Common-wealth, besides those that have beene named in the tenth Booke: as Masters of ships and Mariners, which served to bring in any merchandise or provision for the Princes household, out of forreine Countries into the Princes store-house; yea, although they were private mens ships, which were employed to that service, so that if a private mans ship were laden with any publick provision, there could not any other private burthen be imposed upon him: for that if the ship perish by shipwrack, by reason of the private burthen that is put therein above the publick charge, then he is to answer the losse thereof unto the Exchequer, otherwise than in the case of private men, who are themselves to bear the losse of those things which are exported or imported; neither can they make gain of privat mens shipwrack, or of those things which are cast out into the sea, to ease the lading of the ship, but are bound to restore it to the owner, under pain of confiscation of their goods by the Temporall Law, & excommunication of their persons by the Ecclesiasticall Magistrate. Adde to this, Myncralls or Metallers, & the governours of the same; gatherers of Muskles & other like shell-fish, with whose bloud, either Purple is made, or out of which Pearles are taken: which colour Princes onely might use, as also velvet and cloth of gold; neither was it lawfull for any man (under the degree of the Prince) to weare the same, saving onely women in some sort, for that such ornaments are fitter for women than men. Joyne to these Monetaries, which served to coyne

coyne money, Wain-men or Car-men, which with their owne cattell carried or conveyed things, which belonged to the Princes Treasurie. The like priviledge had they which made Armour for the Princes Armorie, as Speares, Breast-plates, Darts, and such like; or made Bridles, Girdles studded with pearle or pretious stone unto the Court, for the Kings household, who onely were allowed to wear the same. Such as had the care and government of any Corporations, as the Princes Bakers, Vintners, Paper-sellers, Money-changers, Professours of Liberall Sciences, specially in *Rome* and *Constantinople*, which after the seate of the Empire was translated thither, had all the priviledges of old *Rome*, saving the Ecclesiasticall primacie, for which, notwithstanding there was long dissension betweene the two Cities.

Next after *Rome* and *Constantinople*, * *Berytus* a chiefe Citie of *Syrophœnicia* had great priviledges, for the famous Universitie which was in the same, and such Provinces or Countries as served the same, or any of them, with yearly provision of Corne, Oyle, Beeffe, Mutton, Porke, and such other like victuall: which provision was to be distributed among the poore and impotent of the Cities, and not to be given to stout and valiant beggars, which are able to get their living with their owne hands, and therefore were to be compelled to worke. The Aldermen or Governours of Cities, for that they are employed in matters of greater services, yet none of them were to be called to any office before hee had beene even with the Common-wealth, if happely any of them were in debt to it; neither were they or any of them excused more than from personall services, for in prediall duties, they paid every one according to his rate. But as for Enterlude-players and houses of baudery, they had no exemption at all, but paid double charges to the rest. Of Husband-men, some are servants, as Copy-holders; others are free, as Free-holders, who notwithstanding themselves are, as it were, bound unto the soyle, and are rated in the Subsidie according to their Acres; and

* Nullius rei indiga, as Patricius hath it. In the Emperours days it was much renowned for the study of the Law, and is therefore joyned by him in privilege Cum Regiis urbibus, and called Pulcherrima Civitas, & Legum nuxrix in Proëm. Digest. § Hæc autem. And for this cause Impp. Theodosius & Valent. AA. eam urbem Metropolitanam nomine ac dignitate exornarunt, Cod. De Metrop. Beryto l. unic. lib. 12.

if they have no Land, then according to the head or number of their household ; which notwithstanding, at this day is taken away; and these as well pay rent to the owners of the ground (wherein notwithstanding, the Landlord cannot exact of them, or charge them above that which hath beene covenanted betweene them) as Tribute, and Head-silver to the common-wealth : for the declining of which, and avoiding of necessary services of the common-wealth, as no man can put himselfe under the patronage of any Noble man, so also they cannot be called from this service of the common-wealth, to any other. Country-men, such as were addicted to the ground they tilled, although the ground were their owne, yet could they not sell it to any man, but to him that was of the mother-village wherein himselfe was. A Mother-village was that, whence all the villages round about were divided. Although all such husbandmen as dwell in any village, are to pay Subsidie for such goods as they possesse, or such lands as they hold; yet one neighbour is not to be disquieted or arrested for anothers mans due : for that it is a thing unlawfull to trouble one for another, or not to cesse men indifferently, according to the value of their lands, and the worth of their goods. And therefore, the *Romans* in rating of matters of taxes, had first Cessers which rated men according to that which they thought their state to be : then had they Levellers or Surveyors, who considered the rate set downe, mended it, and made it even, easing such persons or grounds as were over-rated, and charging more deeply such others as were overlighly taxed, procuring that such grounds as were waste and barren, should be brought to tillage, and that the barren should be joyned with the fruitfull, that by such meanes the Prince might receive subsidie out of both: March-grounds, and such as lie in the bounds of any kingdome, serve for the maintenance of such Garrisons as are there placed for the defence of the Marches, and such as hold the said lands, are to pay a yearly provision or pension for the same ; as also the Princes pastures, woods, and
forrests,

forrests, which are let out upon a certain yearely rent, either for a certain time, or in fee-farme for ever, which in respect they pay an ordinary payment to the Prince, either in money, or in provision, are discharged from all other ordinary and extraordinary burthens. Publick things are those which appertaine to the Exchequer, or to the Church, which may in like sort bee rented out for a season, or for ever, as the possession of the Exchequer may, so it be done to the certain benefit of the Church, and under such solemnities, as in this case are required, otherwise it cannot be let out but for 30 yeares, or for three lives. Fee-farme is, when lands and tenements, or other hereditaments, are let out for ever, under a certain yearly rent, in reacknowledgement of the soveraigntie thereof, belonging still to the first Lord, whereby both the right and possession passeth to the farmer in fee.

S E C T. 5.

The Matter of the 12. Booke of the Code.

THe third and last of these Bookes, treateth of the honours that the Exchequer giveth; of which the first and chiefest was the Pretorship, which anciently was a great dignity, but after became an idle name onely, and a burthen to the Senatours, as in which at their owne charges they were to set out playes and shewes, and gave unto the Emperour, in consideration of his or their glebe land, a certain quantity of gold called *Aurum glebale*, or if they had no glebe-land, then offered they to the Emperour another peece of gold, called *Follis aurea*, both which afterward were taken away. Next was the Consulship, which was not to be sought by ambition, or by scattering money among the people, but by cleere suffrages and desert: After the Consulship came in place, the Constable, or Master of the Souldiers, and those which were called *Patricii*, for that their fathers had beene Senators, whose place under *Augustus* was equall to the Consuls, although they were in no

office and function of the common wealth; and the other is not so much an administration as a dignity, as the Senatorship anciently was, into the which who that were admitted, were accounted as Parents to the Prince, and Fathers to their Countrey: Fourthly in place were the Princes Chamberlaines, who were adorned with sundry privileges, and had the title of honour: Fifthly followed the Treasurer, who was Master of all the receipts and Treasure of the Prince, publick or private, and of all such officers as were underneath him: Then the Prenotary, chief Notary or Scribe of the Court, who was called *Primicerius*. [To this purpose note, that the Ancients for want of those more proper materials, which Experience hath discovered to our times, were wont to write in waxen Tables, as may be observed out of the *Junior Plinie* in an Epistle to *Tacitus*. Note also, that upon occasion given for inrolling of their names, who bare any office or dignity, the use was, to set the highest degrees in *primâ cerâ*, in the first place of the Table, from hence they were called *Primicerii*: therefore hee that is chiefe of any dignity or office, may be called *Primicerius*, according to that of *Phavorinus*: Πρωμικηρς ὁ μέγιστος τῶν τιμῶν καὶ τῶν ὀφειλῶν, the first of any * order: hence it is, that we finde in *Codin*, *Primicerios Aulae, Lectorum, Barangorum, &c.* and for this cause the Law here calleth the chiefe Notarie *Primicerium*.] After him that was first Secretarie, there was another, called *Secundocerus*, the second Secretarie, and after them, other Clerks of the Councell, who were not all in one degree, but some were first, some were second, and so in order, as their person, place, and time did require: Over whom was the Master of the Rolles, who now is called Chancellour, & such as were of the Princes privie Councell, or Assessors of his privie consistorie, wherein he heareth Embassages, and debateth the greatestt affaires of the State, and other weighty matters. The President or Tribune of the Schooles, where young men were trayned up to feats of Armes. The Martials or Presidents of Militarie affaires: The Physicians of the Princes body

Lib. 1. Epist.

* *Austin* calleth
S. Stephen *Primicerium*
Mar-tyrum, and the
Archbishop of
Dole in his Hist.
of *Jerusalem*
called S. Peter
Primicerium
Apostolorum.

body, *Constantine* in old time honoured with the title of Earles, as he did the rest of his chiefe officers, but now they are without the dignitie of that title: The Earles of the Countries who governed the Provinces or Shires whereof they were Earles: Professors of Law, and other sciences twenty yeares together, deserved by the Law to be made Earles. The Porters of the Court, and the Princes watch, which watched nightly for the defence of his body, the guard or protectors of the Princes body, & their Captain, amongst whom the chiefe were the Standerd-bearers, as in whom the Prince reposed most trust, and used them chiefly in all matters of danger. Next unto the Chancellour, or Master of the Rolls, were the Clerks, and others that served in the Rolls, in which the decrees and rescripts of the Prince, the Supplications of the subject, and the orders thereupon set downe are recorded, laid up, and kept, as the Rolls of Remembrances, of Epistles, Libels, Ordinances, Gifts given by the Prince, and such like: besides such as serve the Prince, not in matters of learning, or warre, or the pen, or other like places above-named, but in actions of the common-wealth, and in publick offices either of peace or warre, and their Presidents or Governours, among whom are Post-masters, to whom the care of the publick course doth appertain: the Treasurer of the Chamber, who hath the keeping of the privie purse, and such things as come to the Prince by the way of gift; the Master of the horse, his Queries and riders; the yeoman of the Styrrop, and the Princes footmen; the * Castellians or officers of the household, which were part of the Princes family, appointed for the inner services of the Prince in the Court, as his Tasters, Butlers, Wayters, Chamberers, and such other, and their Governours, Harbingers, which upon remove provide for the Princes lodgings; all which had fundry priviledges and immunities, for that they were all

**They were called in the Title Castrensiarum. Cod. De Cast. & Minist. lib. 12. And these were Pars Regiæ familiæ Servitiis & Ministeriis Principis interioribus, in aula &*

castris devota, ut Præpositores, Pincernæ, Vestitores, Pistoris, &c. Cujacius hic, & Wessening. in Oeconom. Juris pag. 225.

accounted

† Schooles in the
Code are Cor-
pora five ordi-
nes officialium,
hoc est, eorum
qui munere &
officio aliquo
quod ad Prin-
cipis Ministeri-
um pertineret,
fungebantur.
Prat. Concer-
ning these, see
Panciroll. upon
the Noutia Im-
perii. The Au-
thour whereof
(Marian & Scor,
if it be as Cui-
cius saith) rec-
koneth no more
the ten Schooles,
but the Empe-
rour maketh
mention of ele-
ven. Cod. de
Locat. & Cond.
l. fin.

accounted as Souldiers, as also the eleven † Schooles for Henchmen, wherein sundry youthes, under masters appointed for that purpose, were trained up, some in learning, some other in Militarie discipline, that they might be made fit for the service of the Prince and Common-wealth, and had for their better education an *annuall* allowance of the Prince; and from thence when they were sufficiently instructed, or trayned up, were sent out to such services as they were fit for.

Of such as were attendants about the Prince, and were employed in his service, the chiefest of all were the Senators, and therefore are called in the Law, the Companions of the Prince, and have all the priviledges that Souldiers have: The second order was of them that were Knight-riders, which either did, or might serve in warre: In the third ranke were such as were in dignity. All may be compelled to serve in warre, which have neither just excuse, nor exemption, nor have any leave of the Captaine to bee absent, unlesse they be Merchant men, or be indebted unto the Common-wealth, or obnoxious to the Law, for any crime they have committed.

Under the title of Militarie discipline is declared, how men are to be trayned up to the knowledge of warre, what oath is to be taken of such as are prest to be Souldiers, how they are to be distributed into bands, what use or benefit the Common-wealth hath by them; what is their office, and how they are to be mustered, or else translated from one degree to another, how they are to be joyned, if they offend, what priviledges belong unto them; what stipend or wages is due unto them; as allowance of corn, & the baking of the same into bisket, which was a kind of bread twice baked for the better durance of it, & the carriage thereof from place to place, so often as they hapned to remove; their livery or apparell, and the times of the delivery of the same, or money in steed thereof; lodging, and provision of salted meat the longer to endure: how long Souldiers may be absent from the campe, and who is to give them leave for absence,

sence, and what is the punishment of them, that without just cause be longer absent from the army, then they have leave. Of young souldiers, and of their trayning up; of old souldiers, and of their priviledges: Provision for keeping safe the Sea coast, and ordinary high wayes of the Countrey, that such as journey may passe free without hurt or damage: of runagates out of the Army, & such as conceale them, and of either of their punishments: of the sonnes of such officers as have died in the warre, and of their preferment, if any be fit for it, that they succeed in their fathers office, or roome: Of the Sergeant Major, the Clarke of the band, and other such officers of the Campe, and of their office, reward, and punishment: Of places disposed of, for publick poasts, and carriages in high beaten wayes, and other by wayes on necessity, & how the same & the Cattle are to be used, that is, that they be not driven forward with staves or clubs, but with whips onely, and that no poast-horse, or carriage be taken, but for publick use of poast-letters; to whom they are to be granted, and for what time: Of the Apparitors, Seargeants, Sumners, or Baylives: Of sundry great officers, & of their Scribes, & Registers, and of their trialls: Of fees of Advocates, and of the extortion of Apparitors. And this is the summe of those things which are especially contained in the Code, besides other things which it hath, common with the Digest; the knowledge whereof at this day, is not so necessary for the Civilian (who in this age hath little use thereof) as it is expedient for Councillours of State, and such as are called to place in Court, who may there-out make many things to direct them in their place, as the variety of those things which are herein handled doth very well shew.

CHAP. III.

SECT. I.

What the Authenticks are, and why they are so called.

THe third Volume of the Law is called the Authenticks, of the Greek word *αυθεντικῶν*, either because they have authority in themselves, as proceeding from the Emperors owne mouth, or that they are originals to other writings, that are transcribed out of them.

The Authenticks therefore, are a Volume of new Constitutions, let out by *Justinian* the Emperor, after the Code, & brought into the body of the Law under one Booke.

In the Authenticks, is not that order observed in the disposition of the Lawes, as is either in the Digest, or the Code, but as occasion was offered of any doubt, wherein Princes resolution was necessary to every thing, so it is set downe without any other methode or forme.

* In the Latine translation, for the Greeke text acknowledgeth not this division into Collations.

The whole Volume is divided into *9. Collations, Constitutions, or Sections; and they again into 168. Novels, which also are distributed into certaine Chapters.

They were called † Novels, because they were new Lawes, compared to the Lawes of the Digest, or the Code.

† *quod novissime promulgata sunt post Cod. Justin. Repetitio Praelectionis:*

& therefore the

Greeke calleth them *νεαεῖς ἢ κώδικες*: so likewise the constitutions of the Emperours, which were new published after the *Βασιλικὴ*, were called the Novels of *Leo*, *Nicephorus*, *Michael*, &c.

SECT. 2.

SECT. 3.

The summe of the first Collation.

OF the generall, the first title and first Novell of the first Collation is, that Heires, Feoffees, Executors, Administrators, and their successors, shall fullfill the Will of the deceased, and within one year after his decease, shall pay his Legacies and Bequests: and if they be once sued for it, they shall forthwith pay that which is due upon the Will, (deducting only a fourth part, which is due unto the heire by the Law *Falcidia*) or else, to lose such bequests, as themselves have in the Will.

That it shall not be lawfull for a widow, comming to a second marriage, after her first husband is dead, to sequester one of her children from the rest, upon whom shee will bestow such things, as her first husband gave her before marriage, but that the benefit thereof shall be common to them all: Neither that shee convey it over to her second husband, or his children, & so defraud her first husbands children. And that a man in like sort surviving his wife, shall doe the like toward his first wives children, as concerning such Dowry as the first wife brought to her husband.

Of Suerties & Warranties, that the Creditors shall first sue their Debtors, and take execution against their goods, and finding them not payable, shall then take their remedy against the Suerties.

Of Monkes, that they build no Monasteries, but with the leave of the Bishop, who is there with prayer to *lay the first stone: And that the Bishop shall appoint such an Abbot over the monkes, as in vertue and in merit excels the rest: And besides of their habit, conversation, professions, and change of life, and who is to succeed them in their goods and inheritance.

Of Bishops and Clerks, that is, that Bishops and Clerks be of good fame, of competent learning, and age, and that

H 2

they

But the Empe-
rour maketh no
mention of this
Rite, for thus
saith the Law:
None shall pre-
sume to erect a
(Church or)
Monasterie, till

the Bishop of the place beloved of God, haveing beene made acquainted with it, they be ordeined and promoted without Simonie, or briberie, or injurie of the present Incumbent: And that there be a set number of Clerkes in every Church, lest the church and Parishoners thereby be over-charged.

shall come, and lift up his hands to heaven, and consecrate the place to God by prayer; Πηξάμεν θ' ἐν αὐτῷ τὸ ἡμετέρας αὐμβολον σωτηρίας (φάρμακον ἢ ἡ προσκυνητὸν ὑψίστου ὄντως σωτῆρα): and there erect the Symbole of our Salvation, wee meane, the venerable and truly precious Rood. In *Auth. De Monach. § Illudigitur. Coll. 1.* See also *Novell. 123. & 131.* And the like is commanded in the βασιλικὰ. Τὸν δὲ οἰκοδομεῖν βεβούλητον Μοναστήριον προεκαλεῖν αὐτὸν φασὶ ἡ δὲ οἰκοδομὴ καὶ ποιεῖν Συναγωγὴν. Yet that this Ceremony of laying the first stone; hath beene of ancient use in the Greeke Church, may be observed out of their Euchologue, where it is said, that the Bishop, after some other Rites performed, εἰς ἐν τῷ τόπῳ ἐν ᾧ τὸ ἅγιον πῦρ γινώσκει μέλλει δυσιαστέον λέγει τὴν εὐχὴν καὶ μετὰ τὴν εὐχὴν ποιεῖ σπόλυσιν, εἶτα λαβὼν ἓνα ἁγίων λίθων καὶ χαρτῆας δι' αὐτῶν σωτῆρα αὐτὸς ταῖς ἰδίαις χερσὶ τίθεισιν αὐτὸν ἐν τῷ θεμελίῳ, λέγων. Εθεμελίωσεν αὐτήν, &c. καὶ ὥτως οἰκοδομεῖται ἡ οἰκοδομὴ ἀρχομεναι: standing in the place where the holy Altar shall be set, saith a prayer, which being ended, he giveth the *Ite Missa est*, and then taketh up one of the stones, and having cut a Crosse upon it, himselfe with his owne hands layeth it upon the Ground-werke, then hee pronounceth the Εθεμελίωσεν αὐτήν, συναγωγὴν: the Reader may see εἰς φυλλ. ρμα. of the Euchologue. The like Ceremonies are used in the Latine at this day, as may be seene in their *Pontificale*, page the 281. of that which *Clement* the 8. set out at Rome, in the yeare 1565.

SECT. 3.

What is contained in the second Collation.

THE second Collation treateth of the churches State, that the lands of the Church be neither sold, aliened, nor changed away, but upon necessity, or that they be let to farme for a time, or upon other just cause) no not with the Prince himselfe, unlesse the change be as good, or better, than that which heereceiveth from the Church, & if any man presume contrary to this forme, to change with the Church, hee shall lose both the thing he changed, & the thing he would have changed for it, and both of them shall remaine in the right of the Church: And that no man give or change a barren peece of ground with the Church.

That

That Iudges and Rulers of Provinces bee made without gifts: of their office, power, authoritie, and stipend, and that they sweare, they shall so sincerely and uprightly execute their office, as knowing they shall give an account thereof to God and the King; which oath they shall undergoe before the Bishop of the place, and the chiefe men of that Province, whither they are sent to be Iudges or Governours.

Of the Masters of Requests, and their office, which offer to the Prince suters Petitions, and report them back from the Prince unto the Iudges.

Of wicked and incelluous Marriages, and that such as marrie within those degrees, forfeit all that they have unto the Exchequer, for that when they might make lawfull marriages, they rather chuse to make unlawfull marriages.

SECT. 4.

The argument of the third Collation.

THE Third Collation conteineth matter against Bawdes, that they be not suffered in any place of the Roman Empire, that being once warned to forbear their wicked profession, if they offend therein again, they die the death therefore: If any man let any house to a bawd, knowing him to be a bawd, then he shall forfeit *x. li. to the Prince, & his house shall be in danger to be confiscated.

Of Majors and Governors of Cities, that such be chosen that be honest people, and men of credit, and that no man of the Citie being thereto chosen, refuse the same, & that such as are thereto chosen, shall sweare they will proceede in every matter, according to Law and Conscience.

That there be a certaine number of Clerkes in every Church and that it be neither diminished, nor increased, & therefore that their be a translation of those that abound in one Church, into another Church that wanteth.

The precepts which Princes gave to Rulers of Provinces,

** Sciat se decem
librarum auri
sustinere penā,
& circa ipsam
periclitaturum
habitationem,
In Auth De Le-
nonibus. § San-
cimus. Coll. 34*

ces, were these in effect: that wheras themselves were freely chosen therunto, they should in due sort & order goe into their Provinces, that they should keepe their hands pure from bribes, that they should carefully looke unto the Revenues of the Exchequer, & the peace and quiet estate of the Province, repress outrages and rebellions, procure that causes be ended with all indifferencie, & ordinary charges: to foresee, that neither themselves, nor any of their officers, or under ministers, doe injurie to the people, and so those that ought to helpe them, should hurt them: To provide that the people want not necessary sustenance, & keepe the Walls of the Citie in reparation: that they punish offences according to the Law, without respect to any mans privilege, neither admit any excuse in the examining or correcting of the same, save innocencie only: that they keepe their Officers in order: that they admit to their Councell such as are good men, and are milde towards such as are good, & sharpe towards such as are evill: that they afford not Protections to every man, neither to any one longer then it is fit and convenient it should be: that where they remove, they vex not the Countrey men with more cariages then is needfull: that they suffer not Churches, and other like holy places, to be a Sanctuarie to murtherers, and other such like wicked men: that they suffer not Lands to be sold without fine made to the Exchequer: that they regard not Letters or rescripts, contrary to Law, and against the weale publick, unlesse they be seconded: that they suffer not the Province to be disquieted under pretence of Religion, heresie, or schisme, but if there be any Canonick or ordinary thing to be done, they advise thereabout with the

** Auxiliabun-
tur autem tibi
ad hoc etiam
Deo amabiles
Ecclesiarum de-
fensores De
Mand. Princip.
¶ Neque autem
homicid.*

*Bishop: that they doe not confiscate the goods of such as are condemned: that they patronize no man unjustly: that no man set his Armes or Cognisance upon an other mans Lands: neither that any carrie any weapon, unlesse he be a Souldier.

What is an hereditary portion, and how children are to succeed: of such as deny their owne hand-writing, &

** how*

*how they are to be punished as well in personall as in reall actions: and that such deniers after their deniall be not admitted to other exceptions: and the takeing away the thing in controversie from him, which denied the true owner to be Lord thereof.

SECT. 5.

What is comprehended in the fourth collation.

The fourth Collation handleth matters of Marriage, and that marriage is made onely by consent, without either lying together, or instruments of dowrie: Of women that marrie againe within the yeare of mourning, which by Law in sundry sorts were punished, for confusion of their issue: that there be an equall proportion in the Dowrie, and the Ioynture: Of Divorce and seperation of marriages and for what causes, by consent, for impotencie, for adulterie: and that Noble women, which after the death of the first husband, being noble personages, marry to inferiour men, shall lose the dignity of their first husband, and follow the condition of their second husband.

Of Appeales and within what time a man may appeale, and from whom, and to whom the appeale is to be made.

That none which lends money to a husband-man, take his land to morgage, and † how much usury-money a man may take of a husbandman.

Of her that was brought to bed the eleventh moneth, after her husbands decease, and that such as are borne in the beginning of the same moneth, are to be accounted for legitimate, but such as are borne in the end thereof, are to be holden for bastards.

that was delivered of a childe the 14. moneth after her husbands decease, neverthelesse the good repute which was generally conceived of this womans continencie, prevailed so much against the letter of the Law that the reverend Judges awarded the case of child-birth to be extraordinary, the woman to be chaste, and the childe legitimate: *Hac tamen in exemplum trahi facile non oportet*, as the Glosse there concludeth.

† *Nihil amplius
quam si quisquam
unam pro singu-
lo solido annu-
am prestare.
Ne qui quod
Agricol. §. San-
cimus.*

The Glosse re-
laxeth a matter
of fact contrary
to this Law: A
widow in Paris

* χαρτην κειμε-
νην: Chartam
puram.

Of instruments and their credit, and that in every instrument there Protocols left, that is, signes and notes of the time when such contract was made, and who was notarie and witnesses to the same, and that after it be written faire, and ingrossed in a lidge or faire * *mundum* Booke.

SECT. 6.

What is comprised in the fifth Collation.

THe fifth Collation forbiddeth the alienation or selling away of the immoveable possessions of the Church, unlessse it be done under certaine solemnities, and then onely when the moveable goods are not sufficient to pay the debts of the Church or holy place.

Further, it provideth that the name of the Prince for the time being, be put in all instruments, and the day and yeare when the instrument was made.

That the Oath of the deceased, as concerning the quantitie of his goods, so farre as it toucheth the division of the same among his children, be holden for good, but that it be in no sort prejudiciall to the creditors.

Of women tumblers, and such other of like sort, which with the feats of their body, maintaine themselves, that no oath or suertie be taken of them, that will not leave that kind of life, since such oath is against good manners, and is of no value in Law.

That such gifts as are given by private men to their Prince, need no record, but are good without enrolling of them; and in like sort such things as are given by the Princes to private men.

That no person, thing, or good of an other man be arrested for an other mans debt, which they now call reprisals, and that he which is hurt by such reprisals, shall recover the foure double of the damages that he hath suffered thereby, and that one man be not beaten or stricken for another.

That he that calls a man into law out of his Territorie, or Province where he dwelleth, shall enter caution, if he ob-
taine

teine not in the sute against him; hee shall pay him so much as the Judge of the Court shall condemne him in. And that hee who hath given his oath in judgement, shall pay the whole costs of the sute, but after shall be admitted to prosecute the same if he will, so that he put in suerties to performe it.

That such women as are unindowed shall have the fourth part of their husbands substance, after his death, and in like sort the man in the womans, if the man or woman that surviveth be poore.

That Churches or Religious persons may change grounds one with another: for that one priviledged persons right ceaseth against another, that is in like sort priviledged.

That such changers of Mannors, Lands, Tenements, and Hereditaments, as are made by Church-men to the Prince, be not fained matters, and so by the Prince come to other mens hands, who have set on the Prince to make this change, and that the change be made to the Princes house only, and if the Prince, after convey, or confer the same upon any private man, it shall be lawfull for the Church to re-enter the same again, and to re-possesse it as in her former right.

That in greater Churches, Clerks may pay something for their first admittance, but in lesser Churches it is not lawfull.

That such as build, found, or endow Churches (which must goe before the rest) doe the same by the authoritie of the Bishop; and that such as are called Patrons, may present their Clerks unto the Bishop, but that they cannot make or ordaine Clerks therein themselves.

That the sacred mysteries or-ministeries be not done in private houses, but be celebrated in publick places, lest thereby things be done contrary to the Catholick and Apostolick faith; unlesse they call to the celebrating of the same, such Clerks, of whose faith & conformity there is no doubt made, or those who are deputed thereto by the good will of the Bishop. But places to pray in, every man may have in his owne house; if any thing be done to the contrary,
I the

the house wherein these things are done, shall be confiscated, and themselves shall be punished at the discretion of the Prince.

That neither such as be dead, nor the Corse or Funerall of them be injured by the creditors, but that they be buried in peace.

That womens Joyntures be not sold, or made away, no not even with their owne consent.

In what place, number, forme, manner, and order the Princes Councell is to sit, and come together.

That he that is convented in judgement, if hee wilfully absent himselfe, may be condemned after issue is joyned.

That no man build a Chappell or Oratorie in his house, without the leave of the Bishop, and before he consecrate the place by prayer, and set up the Crosse there, and make Proceession in the place; and that before he build it, he allot out lands necessary for the maintenance of the same, and those that shall attend on Gods service in the place: and that Bishops be not non-residents in their Churches.

That all obey the Princes Judges, whether the cause be Civile or Criminall they judge in; and that the causes be examined before them without respect of persons, and in what sort the Proces is to be framed against such as be present, and how against those that be absent.

S E C T. 7.

What is the matter of the sixth Collation.

THe sixth Collation sheweth, by what meanes children illegitimate, may be made legitimate, that is, either by the Princes dispensation, or by the fathers Testament, or by making instruments of marriage betweene the Mother and Father of the children, so that the Mother die not before the perfecting of them, or that shee live riotously with other men, and so make her selfe unworthy to be a wife.

That Noble personages marry not without instruments of Dowrie, and such other solemnities as are usually in this behalfe,

behalf, that is, that they professe the same before the Bishop, or minister of the place, and three or foure witnesses at the least, and that a remembrance thereof be left in writing, and kept with the Monuments of the Church; but that it shall not be needfull for meaner persons to observe the former solemnities.

That such as were indebted to the Testator, or they to whom the Testator was indebted, bee not left Tutors or Guardians to their children; that if any such be appointed a Tutor, a Curator be joyned to him to have an oversight of his dealing: that Tutors or Curators are not bound by Law to let out the Minors money, but if they doe, the interest shall be the Minors; & the Tutor shall have every year two moneths to finde out sufficient men, to whom hee may let the money out to hyre, for that it is let out at his perill: that if the Minors state be great, so that there will be a yearly profit above his finding, the Tutor shall lay up the residue for a stock against he comes to age, or buy land therewith, if he can finde out a good bargaine, and a sure title: but if the childes portion be small, so that it will not finde him, then the Tutor or Curator shall dispose of the Minors state, as he would dispose of his owne, to which also hee is bound by oath.

How such instruments as are inrolled before Iudges, concerning matters of borrowing or lending and such like, may have credit: how men may safely bargain either with writing or without writing, if themselves be ignorant men; and of the comparison of Letters, & what credit there is to be given to an instrument, when the writings and witnesses doe varie among themselves.

Of unchast people, and such as riot against nature, whose punishment is death.

Of such as despitefully, on every light trifle, sweare by God, and * blaspheme his holy name, against whom also is provided the sentence of death.

That the Iustices of Peace, or other Officers to that purpose appointed, speedily dispatch the businesse of those

The crime of Blasphemy was so odious to the Emperour, that he thought God would never suffer a blasphemer to go unpunished; & for sins of this nature, saith he, the world is visited with famines, plagues, and pestilences: therefore the Law heere provideth that a blasphemer shall undergoe *ultimum supplicium*.

If thou meetest (saith Chrysostome) a man blaspheming, *πάμσον αὐτὸν ὁ δὲ σου, σύντερον αὐτὸ τὸ σῶμα, ἀνάσσειν σε τὴν χεῖρα διὰ τῆς ἀνυψίς*: Strike him a boxe on the eare, give him a dash in the mouth, and sanctifie thy hand with a blow. *Ἀνδράων. α. five* Hom. 1. ad Pop. Antiochenum. pag. 460. edit. Savil.

which are of their jurisdiction: that such as come as strangers and forreiners out of other Countries; having no just cause of their coming, be sent back againe with their substance, to such places as they came from; but if they be idle vagabonds and rogues, or other like valiant beggars, they either drive them out of the place, or compell them to labour: yet evermore having regard to provide for such as are honest, poore, old, sick, or impotent.

That Clerks be first convented before their Ordinarie, and that the Ordinarie doe speedily end the matter, that they may not be long absent from their benefices: and that they be not drawne before temporall Judges, unlesse the nature of the cause doe so require it, as that it be a meere civile cause, or a criminall cause, belonging wholly to the Temporall court; wherein, if a Clerk shall be found guilty, he shall first be deprived from his ministerie, and then shall be delivered over into the Secular hands: but if the crime be solely Ecclesiasticall, the Bishop alone shall take knowledge thereof, and punish it according as the Canons doe require.

That where one dyeth without issue, leaving behind him brethren of the whole blood, & brethren of the half blood; the brethren of the whole blood have the preheminance in the lands and goods of the deceased, before the brethren of the halfe blood, whether they be of the fathers side, or the mothers side.

That no man make Armour, or sell it, without the Princes leave, unlesse they be knives or other such like small weapons.

S E C T. 8.

What is the matter of the seventh Collation.

THat prooffe by witnesses was devised to that end, that the truth should not be concealed; and yet all are not fit to be witnesses, but such alone as are of honest name and fame, and are without all suspicion of love, hatred, or corruption:

tion; and that their dispositions be put in writing, that after the witnesses be published, and their dispositions be knowne, there be no more production of witnesses, unlesse the partie sweare those proofes came anew unto his knowledge.

If Parents give profusely to one of their children, the other notwithstanding shall have their lawfull portions, unlesse they be proved to be unkind towards their parents.

That women, albeit they be debtors or creditors, may be Tutors or Curators to their children; and that there is not an oath to be exacted of them that they will not marry againe, so that they renounce their priviledge granted unto them *per Senatûs consultum Velleian*: and performe all other things, as other Tutors doe.

That Governours of Provinces are not to leave their charges, before they are called from thence by the Prince, otherwise they incurre the danger of Treason.

That womens Dowries have a priviledge before all other kinds of debt; that what Dowrie a woman had in her first marriage, shee shall have the same in her second marriage, neither shall it be lawfull for her father to diminish it, if it returne againe unto his hand.

That a man shall not have the property of his wifes dowry, neither a woman the property of that which is given her before marriage, but the property of either of them shall come unto their children, yea though they marry not again.

S E C T. 9.

What is comprised in the eighth Collation.

Wills or Testaments, made in the behoofe of children, stand good, how ever imperfect otherwise they are, but they are not availeable for strangers (but strangers are they which are not children) neither mattereth it whether the Will or Testament be writ by the fathers hand only, or by some other body by his appointment; and as the father divideth the goods among the children, so they are to have their parts.

*De Testamentis
imperfectis. S.
Nos igitur.*

Of Hereticks, and that such are Hereticks, which doe refuse to receive the holy Communion at the Ministers hand, in the Catholick Church: That Hereticks are not to be admitted to roomes and places of honour, and that women-Hereticks may not have such priviledge as other women have in their Dowries.

That is called Marriners usurie, that is wont to be lent to Marriners, or Merchant-men, specially such as trade by sea; which kind of lending, the Law calleth passage-money, in which kinde of usurie, a man cannot goe beyond the 100. part.

That Churches enjoy a 100. years prescription.

That such things as are litigious, during the controversie, are not to be sold away. A litigious thing, is that which is in sute betweene the plaintife and defendant.

That while the sute dependeth, there be no Letters or Edict procured from the Prince concerning the cause in question, but that the cause be decided according to the generall Lawes in use.

That in Divorces, the children be brought up with the innocent partie, but at the charges of the nocent; and that Divorces bee not admitted, but upon causes in Law expressed.

That no woman, whose husband is in warfare, or otherwise absent, shall marry againe, before she have certaine intelligence of the death of her former husband, either from the Captain under whom he served, or from the Governour of the place where he died; and if any woman marry again without such certain intelligence, how long soever otherwise her husband be absent from her, both she and he who married her, shall be punished as adulterers; and if her former husband after such marriage, returne back againe, she shall returne againe to her former husband, if hee will receive her, otherwise she shall live apart from them both.

*De hered. ab
intestat. § Si
quis autem.*

If any man beat his wife for any other cause, than for which he may be justly severed or divorced from her, he shall for such injurie be punished.

If

If any man conceive a jealousie againe his wife, as that she useth any other man more familiarly than is meete she should, let him three severall times admonish him thereof, before three honest and substantiall men; and if after such admonition hee be found to commune with her, let him be accused of adultery before such a Iudge, who hath authority to correct such offences.

S E C T. 10.

What is the matter of the ninth Collation.

THe ninth & last Collation containeth matter of succession in goods, that as long as there be any Descendent, either Male or Female, so long neither any Ascendent, or any Collaterall can succeed; and that if there be no Descendent, then the Ascendent be preferred before the Collateral, unless they be brethren or sisters of the whole blood, who are to succeed together with the Ascendent; but in Ascendents, those are first called which are in the next degree to the deceased, then after those which are in a more remote degree: that in Collaterals all be equally admitted, which are in the same degree, and of the same Parents, whether they be male or female.

That the lands of any Church, Hospitall, or other like Religious place, be not sold, aliened, or changed, unless it be to the Princes house, or to, or with another like Religious place, and that in equall goodnesse and quantitie, or that it be for the redemption of Prisoners: and that they be not let out to any private man more than for 30. years, or 3. lives unlesse either the houses be so ruined, that they cannot be repaired without great charges of the Church, or other religious houses, or that it be overcharged with any debt or duties belonging to the Exchequer, and thereby there cometh small revenue to the Church, or Religious place thereout; in every of which cases it is lawfull to let out the same for ever, reserving a yearly competent rent, and other acknowledgement of other sovereignty therein.

That

That the holy vessels of the Church be not sold away: unless it be for the ransoming of Prisoners, or that the Church be in debt; in which case, if they have more holy vessels than are necessary for the service of the Church, they may sell those which are superfluous to any other Church that needeth them, or otherwise dispose of them at their pleasure for the benefit of the Church, or other holy place whose they are.

Where Usurie in proceſſe of time doth double the principall, there Usurie for the time to come doth cease, and those particular payments which afterwards do follow are reckoned in the principall.

What kinde of men are to be chosen Bishops, such as are sound in faith, of honest life and conversation, and are learned, that such as chuse them, sweare before the choyce, they shall neither chuse any for any reward, promise, friendship, or any other sinister cause whatsoever, but for his worthinesse and good parts onely.

That none be ordained by Symonie, and if there be, that both the giver, taker, and mediator thereof be punished according to the Ecclesiasticall Lawes, and they all made unworthy to hold and enjoy any Ecclesiasticall living hereafter.

That if any at the time of any Bishops election, object any thing against him that is to be elected, the election be staied, till prooffe be made of that which is objected by the adversarie against the party elected, so that hee prove the same within three Moneths; & if any proceeding be to the consecration of the same Bishop in the meane time, it is void.

That the Bishop after he is ordained, may without any danger of Law, give or consecrate his goods to the use of the Church, where he is made Bishop, and that he may give such fees as are due to the electors by law or custome.

That Clerks be not compelled to undergoe personall functions, and services of the common-wealth, and that they busie not themselves in secular affaires, and so thereby be drawn from their spirituall function.

That

That Bishops for no matter or cause bee drawne before a temporall Iudge, without the Kings speciall commandement, and if any Iudge presume to call any without such speciall warrant, the same is to lose his office, and to be banished therefore.

That no Bishop absent himselfe from his Dioces without urgent occasion, or that he be sent for by the Prince, and if any doe absent himselfe above one yeare, that he shall lack the profit of his Bishoprick, and be deposed from the same, if he returne not again within a competent time appointed for the same.

What manner of men are to be made Clerks, such as are learned, and are of good Religion, of honest life and conversation, and are free from suspicion of incontinencie: that no Minister be lesse than 35 yeares of age, and that no Deacon or Subdeacon be under 25. that all Clerks and Ministers be ordeined freely.

If any build a Church, and endow the same, that he may present a Clerk thereto, so that he be worthy to be admitted thereto: but if he present an unworthy man, then it apperteineth to the Bishop to place a worthy man therein.

If any Clerke be convicted to have sworne falsely, hee is to be deprived of his office, and further to be punished at the discretion of the Bishop.

That Clerkes be convented before their owne Bishops, and if the parties litigant stand to the Bishops order, the Civile Iudge shall put it in execution: but if they agree not upon the judgement, then the Civile Iudge is to examine it, and either to confirme or infirme the Bishops order, and if he confirme it, then the order to stand, and if not, then the party grieved to appeale.

If the cause be criminall, and the Bishop finde the party guilty, then the Bishop is to degrade him, and after to give him over to the secular power: the like course is to be held, if the cause bee first examined before the temporall Iudge, and the partie found guiltie, for then he shall be sent to the Bishop to be deprived, and after againe shall

be delivered to the secular powers to be punished.

That Bishops be convented before their Metropolitans.

*Si vero etiam
Litaniarum con-
cussit capita-
le periculum
sustinebit. De
Sanctissim. E-
piscop. & Deo
§ Si quis cum
sacra ministr.*

That such as in Sermon time doe abuse, or injure the Bishop, or any Clerk in the Church, being at divine service, be whipt, and sent into banishment: But if they trouble thereby the divine service it selfe, they are to dye the death for the same.

That Lay-men are not to say or celebrate divine Service, without the presence of the Minister, and other Clerkes thereto required.

That such as goe to Law, sweare in the beginning of the suit, that they have neither promised, or will give ought to the Judge, and that usuall fees be taken by the Advocates, Counsellours, Proctors, or Attournies, and if any man take more than his ordinary fees, he shall be put from his place, of practise, and forfeit the foure double of that he hath taken.

That the 4. generall Councils be holden as a Law, and that which is decreed in them,

That the Bishop of Rome hath the first place of sitting in all assemblies, and then the Bishop of Constantinople.

That all Clergy mens possessions be discharged from all ordinary and extraordinary payments, saving from the repairing of Bridges and High-ways, where the said possessions doe lye.

That no man build a Church, or holy place, without the leave of the Bishop, and before the Bishop there say Service, and set up the signe of the Crosse.

That no man in his owne house suffer Service to be said, but by a Minister allowed by the Bishop, under paine of confiscating of the house, if it be the Lord of the house that presumeth to doe it, or banishment, if it be done by the tenants.

If any bequeath any thing to God, it is to be paid to the Church where the Testator dwelled.

If any devise by his last Will a Chappell, or Hospitall to be made, the Bishop is to compell the Executors to performe

forme it within five yeares after the decease of the Testator ; and if the Testator name any governour, or poore thereto, they are to be admitted, unlesse the Bishop shall finde them unfit for the roome.

That the Bishop see such Legacies performed, as either are given for the redemption of prisoners, or for other godly uses.

That Masters of Hospitals make an account of their charge, in such sort as Tutors doe.

That such as lust against nature, and so become brutish, receive condigne punishment worthy their wickednesse.

That such as make Eunuches, themselves be made Eunuches, and if they escape alive, their goods to be forfeited to the Exchequer, and themselves be imprisoned all the dayes of their life.

Such as by force steale away women ; themselves, and such as are their abettors and helpers, are to dye therefore ; and that it shall not be lawfull for her that is carried away, to marry to him that doth carrie her away : and that if her father doe give his consent to such marriage, he is to be banished : but if she marry him without her fathers consent, then is shee not to take benefit by her fathers Will, or any other thing that is her fathers.

These, and sundry matters of great importance, and necessarie for the well governing of a Common-wealth, are contained in the Authenticks, which I passe over with drie foote, not because they are not necessary to be knowne, but because I would not cloy the Reader even with those things which are good.

All these workes are the labour of *Justinian*, as either gathered together by him out of ancient Lawyers books, and such Emperours decrees, as went before him, or elsewhere decreed and ordeyned by himselfe, as matter and occasion offered it selfe, and the youngest of them is neere eleven hundred yeares of age, that is, within 500. yeares after Christ, or not much otherwise.

CHAP. IV.

SECT. I.

*That the last Tome of the Civile Law is the Feudes,
and what they are.*

THe last Tome of the Civile Law is the Feudes, that is the bookes of Customes and Services that the subject or vassall doth to his Prince, or Lord, for such lands or fees as he holdeth of him.

This peece of the Law, although it was not much in use in the old Emperours dayes, yet *Justinian* himselfe seemeth to acknowledge them in his Novell constitutions, calling them *spatiae*, and those which are more carefull to seeke out the beginning of them, bring them, some from the ancient Clienteles or retinews the ancient Romans before Christs time had, as *Budeus* doth; some other from *Alexander Severus* time, who, as *Lampridius* in the life of *Alexander* saith, gave such lands as hee wonne out of the Enemies hands, to his Lords Marchers, and his souldiers, that they should be theirs, and their heires for ever, so they should be souldiers, neither should they come at any time to the hands of any private man, saying, they would more lustily serve, if they fought for their owne land; which opinion commeth next to the ancient border-grounds of the Romans, whereof there is a title in the eleventh Booke of the Code, *De fundis Limitrophis*, that is, of Border-ground: Others referre it over to *Constantines* time the great, who enacted for the benefit of his souldiers, that such Lordships and lands as before time they had their wages out of, should passe over unto their heires, and be appropriated to their familie, or stock, so that they found and maintained continually a certain number of souldiers.

From whence soever it descended, this is certaine, that it came very late to be a particular volume of the Law it selfe:
The

The compilers or gatherers together thereof, were *Obertus de Horto*, and *Giraldus Compagist*, two Senatours of Millaine, who partly out of the Civile Law, and partly out of the Customes of Millaine drew the same, but without forme or order.

See for the originall of the Feudes *Cajacius*, but specially Sir Henry Spelman's Glossarie.

The word it selfe is a barbarous word, but had his originall, notwithstanding, as *Isidore* saith, from the word *Fœdus*, being a good Latine word, and so is to be interpreted *tanquam Fœdum*, that is, as a thing covenanted betweene two: Others deduce it from the word *Fides*, as it were in Latin *Fideum*, and by a more pleasant pronounciation *Fœdum*; whereupon such as are Feudataries to others, are called in Latin *Fideles*, because they owe faith and alleageance to such whose Feudataries they are, who in the Lombard tongue are called Vassals. Besides Fealtie, which some call *Hominium*, by the Feudists is tearmed Homage: for the nature of a Feude is this, that it draweth with it faith and homage: so that such as are Feudataries, or fee-men, professe themselves to owe faith to such, to whom they are in fee, and that they are his men; insomuch, as when a fee-man dieth, his heire doth make faith, and doth his homage to the Lord, as is well seene both in the Lords Spirituall and Temporall of this Land, who both in their creation, and also in their succession one after another sweare an oath, and doe their homage to their Sovereigne, and doe pay other duties which are Symbols and signes of their subjection to their Sovereigne: And for others that are under the degree of Barons, and yet are fee-men unto the King, and so doe not manuell obedience unto his Majestie, they pay yearly something in respect of their homage, according to the quantitie or qualitie of the fee or tenure they hold of the Prince.

A Feude in English may be called a Tenure, which caused *Littleton*, when he treated of Feuds, so far forth as they are here in use in England (such as are all those which are called in Latin *Fœda militaria*, & *Fœda scutiferorum*, called

by *Justinian* ~~supra~~ *leges*, which are by the Lawes of the land, termed by the names of Knights-services, and Eſcuage) to call them by the names of Tenures.

A Feude is a grant of lands, honours, or fees, made either to a man at the Will of the Lord, or Sovereigne, or for the Feudataries owne life, or to him, or his heires for ever, under condition, that he & his heires in case where the Feude is perpetuall, doe acknowledge the giver and his heires to be their Lord and Sovereigne, and shall beare faith and allegiance unto him and his, for the said Tenure, and shall doe such service to him and his for the same, as is betweene them covenanted, or is proper to the nature of the Feude.

S E C T. 2.

That Feuds are either Temporall or Perpetuall, and how.

OF Feuds, some are Temporall, some other are Perpetuall.

Temporall Feuds are those that are given, either for terme of a mans life, or for yeares, or at the Will of the Lord, for some service done, or to be done; such as are Annuities given to Lawyers for counsell, Pensions given to Physitians for their advise, Stipends to any Teacher of Arts and Sciences, Fees for keeping of Towers and Castles; called by Feudists *Castalia*, and is by *Littleton* called Castle-ward, although by him it is taken for a state of inheritance.

Perpetuall Feuds, are rights which a man hath by grant from the Sovereigne, or chiefe Lord of the soyle or territorie, to have, hold, use, occupie, and injoy honours, mannors, lands, tenements, or hereditaments, to him and his heires for ever, upon condition that the said vassall or partie, his heires and successours, doe homage and fealty to his Lord, his heires and successours, for such honours, lands, or hereditaments, and doe him either service in warre, according as it is covenanted betweene the Lord and

and his vassall, or such other service as the nature of his tenure doth require, or if he faile therein, he shall either finde some other in his roome to doe the same, or else pay a certaine summe of money in lieu thereof.

Although this Tenure by the first creation thereof be perpetuall, yet that the sovereignty thereof should not still remaine unprofitable to the first Lord, the whole benefit thereof going continually to the vassall or tenant; it is provided, that the Sovereigne or chiefe Lord the first yeare, the heire or successour of the vassall comes unto his land, shall have the whole revenue of his livelyhood for that yeare, or a certaine summe of money in token of the returne thereof unto the Lord, and the redemption thereof made againe by the tenant, which by the Law of the Novels is called *εισδεκτικόν*, and is well nigh the same that wee call livery, which every heire that holdeth in Knights service, sueth out before hee take possession of his land, as heire to his Ancestours.

This Tenure is either gotten by Investiture, or by Succession.

Investiture is the same that wee call Creation, and is the Premier grant of a Feude or Tenure to any, with all rights and solemnities thereto belonging, wherein the homager, or feodatarie for the most part upon his knees promiseth faith and allegiance under a solemne oath unto his Lord, and his successours.

Investiture,
what it is.

Succession is, whereby the eldest sonne succeedeth the father in his inheritance, and if he faile and have no issue, then the next brother, and so in order successively; and if there be no sonne, then the next heire male, and if there be no heire male, then the land escheares unto the Lord. For the *Lumbards*, from whom the Feuds first came, or at the least were chiefly derived from them, directing all their policie as the *Lacedemons* did, to matters of warre, had no feminine Feuds among them, but after by processe of time, there were created as well Feminine Feudes as Masculine Feudes, insomuch, as where there was no issue male

What is Succession in the Feuds.

male to put them from it, women did succeed in the inheritance.

S E C T. 3.

Of Feudes Regal and not Regal, Leige and not Leige, and how Feudes may be lost.

OF Feuds, some are Regall, some not Regall : Regall are those which are given by the Prince onely, and cannot be given by any inferiour.

Of these, some are Ecclesiasticall, as Archbishopricks, Bishopricks, and such like : Others are Civill or Temporall, as Dukedomes, Earledomes, Vicounts, and Lords, who by that, are distinguished from the rest of the people, that they have the conducting of the Princes Armie at home, and abroad, if they be thereto appointed, and have right of Peeres in making of Lawes, in matters of tryall, and such other like busineses.

Not Regall are those which hold not immediatly of the Prince, but are holden of such Ecclesiasticall or Civill States which have had their Honours immediatly from the Prince.

Besides of Feudes, some are Leige, others not Leige ; Leige Feuds, are they in the which the vassall or feodatarie promiseth absolute fealtie or faith to his Lord, against all men, without exception of the King himselfe, or any other more ancient Lord to whom besides he oweth alleageance or service. Of this sort there is none in this Realme of England, but such as are made to the King himselfe, as appeareth by *Littleton* in the title of Homage, wherein is specially excepted the faith which the Homager oweth to his Lord the King.

Feudes not Leige, are such wherein Homage is done, with speciall reservation of his faith and alleageance to the Prince and Sovereigne.

Of such as are Vassalls or Leige-men, some are called *Valvasores majores* ; others *Valvasores minores*. *Valvasores majores*

*Salve le Foy
que je doy à no-
stre Signour le
Roy. Littleton.
tit. Homage.*

Vassors,

What is the antiquity of Decrees, and who were the Authors that compiled them.

**Trithem.* in his second Booke *De viris ill. ft.* saith, that *Gratian* wrote this Worke at *Benedictina*, in the Monasterie of *S. Felix An.* 1127. Others say, it was done in the year 1151. *Belarmino* to reconcile the difference, saith, that *Gratian* might begin the work according to the first account, and finish it according to the second.

Fathers of the Church, partly of the ordinances of generall & provincially Councils, partly of the Decrees of Popes of former ages. Of the Canon Law there are two principall parts, the Decrees & the Decretals. The Decrees are Ecclesiasticall constitutions, made by the Pope and Cardinals, at no mans suir, & are either Rules taken out of the Scripture, or Sentences out of the ancient Fathers, or Decrees of Councils. The Decrees were first gathered together by *Ivo, B. of Carnar.* who lived in the time of *Urban the 2.* about the yeare of our Lord God 1114. but afterward polished & perfected by *Gratian*, a Monk of the Order of *S. Bennet*, in the yeare * 1149. and allowed by *Eugenius* the Pope, whose Confessor hee was, to be read in Schooles, and to be alleadged for Law.

Of all the severall Volumes of the Canon Law, the Decrees are the ancientest, as having their beginning from the time of *Constantine* the great, the first Christian Emperour of *Rome*, who first gave leave to the Christians freely to assemble themselves together, and to make wholsome lawes for the well government of the Church. The Decrees are divided into three parts, wherof the first teacheth of the origen and beginning of the Canon law, and describeth and setteth out the rights, dignities, degrees of Ecclesiasticall persons, and the manner of their elections, ordinations, and offices, and standeth of one hundred and one distinctions.

The second part setteth out the causes, questions, and answers of this Law, which are in number 36. and are full of great varietie, wisdom and delight.

The third and last part, containeth matter of consecration of all sacred things, as of Churches, bread and wine in the Sacrament, what dayes and Feasts the Primitive Church used for the receiving thereof, of the ministring of the Sacraments in Baptisme, and the use of imposition of hands, all which is set out under five distinctions.

S E C T. 2.

What the Decretals are, and how many parts they comprehend.

The Decretals are Canonically Epistles, written either by the Pope alone, or by the Pope and Cardinals, at the instance or suir

suit of some one or more for the ordering and determining of some matter in controversie, and have the authoritie of a law in themselves.

Of the Decretals there be three Volumes, according to the number of the Authors which did devise and publish them.

The first Volume of the Decretals was gathered together by *Raymundus Barcinus*, Chaplain to *Gregory* the ninth, at his the said *Gregories* commandement, about the yeare 1231. and published by him to be read in Schooles, and used for Law in all Ecclesiasticall Courts. The second is the worke of *Boniface* the eighth, methoded by him about the year 1298 by which hee added somthing to the ordinance of his Predecessours, so he tooke away many things that were superfluous and contrarie to themselves, and retained the rest. The third Volume of the Decretals, are called the Clementines, because they were made by Pope *Clement* the fifth of that name, & published by him in the Councell of *Vienna* about the yeare of grace 1308.

To these may be added the Extravagants of *John* the xxij. & some other Bishops of *Rome*, whose authors are not known, and are as Novell constitutions unto the rest.

S E C T. 3.

What is contained in the first Booke of the Decretals.

EVERY of the former Volumes of the Decretals are divided into five Bookes, and containe, in a manner, one and the same titles; whereof the first in every of them, is the title of the blessed Trinitie, and of the Catholick faith, wherein is set downe by every of them a particular beliefe, divers in words, but all one in substance, with the ancient Symbols, or beleife of the old Orthodox, or Catholick Church.

Secondly, there commeth in place the treatie of Rescripts, Constitutions & customes, & the authority of them, & when they are to be taken for Law: after followeth the means whereby the greater Governours of the Church, as namely, Archbishops, Bishops, & such like, come unto their room, which was in two sorts, according as the parties place or degree was where he was called unto the room, as if he were under the degree of a Bishop, & was called to be a Bishop, or being a Bishop, was

* The old Romans instituted three yearly Solemnities in honour of the Gods for the Fruites of the Earth: These also the Romish Church observed, having first moderated their superstition, and directed them to a more sacred end. To the three, one of their Popes (as they say) added the fourth, with a respect had to those of the Jewes, in *Zech. 8, 19.* and so they were called *Jejunia quatuor temporum*. Their institution at the first had many other causes, for which see the Sermons of *Leo & Durants Rationale*, but in after times

called to be an Archbishop, or to be the Pope himselfe, he was thereto to be elected by the Deane and Chapter of the Church where he was to be Bishop, or by the Colledge of the Cardinals in the Popedome; but if hee were already a Bishop or an Archbishop, & were to be preferred unto any other Bishoprick or Archbishoprick, then was he to be required of the Church, he was desired unto and not elected, which in the Law was called *Postulation*; after *Postulation* followed translation by the superiour, to the See to which hee was postulated or required: after Election followed Confirmation & Consecration of him that was elected, which both were to be done in a time limited by the Canons, otherwise the party elected lost his right therein.

Bishops and other beneficed men, sundry times upon sundry occasions resigne their benefices, and therefore is set downe what a renunciation or resignation is, who is to renounce, and into whose hands, and upon what causes a man may renounce his benefice or Bishoprick: & because under-Ministers are oftentimes negligent in their Cure, that the people, in the meane time may not be defrauded of Divine Service, the Sacraments, & the food of the word of God; it is provided, that the Bishop shall supply the negligence of such Ministers as are underneath him in his jurisdiction: besides, because holy orders are not to be given but by imposition of hands, with prayer and fasting. * Foure fit times in the yeare are limited for the same; where also is set downe how they are to be qualified which are to be ordered, what tryall or examination is to be had of them, what age they are to be of, and what gifts of body or minde they are to be endowed withall: what Sacraments may be reiterated, what not: that Ministers sons are not to succeed their Fathers at these Solemnities, especiall regard was had to the Ordination of Priests & Deacons, which had beene formerly performed onely once a yeare, in the Moneth of *December*, (as *Amalarus* hath observed.) It seemeth therefore to be otherwise, then as *Bellarmino* hath disputed, whose opinion it is, that these Fasts may be fetcht from the Apostles times, and that one of these foure is mentioned by *S. Luke* in *S. Pauls* voyage to *Rome*, *Act. 27* though the Syriack Paraphrast in that place plainly setteth downe for the Greeke *διὰ τὸ ὅτι ἡ νηστεία ἡδὴ παρεληλυθέναι, ἡ ἡμερὰ καλεῖται τῆς ἡμετέρας, καὶ οὐκ ἡμετέρας* calling it, a Fast of the Jewes, not Christians. But the great and learned Cardinall in his devotion to sacred Orders, tooke an opportunitie to make these Solemnities in every circumstance Apostolicall,

In those benefices; wherein their Fathers immediately before were Pastors or Governours, lest happily thereby there might be claimed a succession or inheritance in the same: that no bondmen or accountants, men distorted or deformed in body, bigamists or twice married men, bee admitted to holy Orders.

In what manner, and with how much care and Christianitie these Fastis have been heretofore observed, it may be

noted out of the second Councell of Millaine, Tit. 1. Decret. 22. where the Bishop is to command, that upon the Sunday before these Fastis, *parochi non solum solenne illud jejunium denuncient, verum etiam in sua unusquisque eorum parochiali Ecclesia supplicationes Litaniaeque pie ac religiose vel missae habeat, vel prosequente fidelium multitudinis foris, Ecclesiam, sicut moris est, obsecrat, ut Dei ope implorata tum Episcopus in eorum delictis quibus ordines conferet Spiritus Sancti lumine illustretur; tum illi quibus conferuntur in vita sanctitate, doctrina, religiosisque virtutibus proficiant.*

In the fourth Councell of Millaine is set down out of Leo, the forme of bidding these Fastis in the Church. *Quod sacrosanctum temporum ratio, etc. and afterwards, Quarta igitur, sexta feria et Sabbato jejunemus, frequentes in Cathedrali Parochiali que Ecclesia ad Iteanias Orationemque conveniamus, et quo sacris illis Fervens a cibo abstinentiores esse debemus, eo abundantiori elemosinarum liberalitate erga Christi pauperes effusiores simus: tum Sabbato sub vesperum orationem Parochialem communem celebremus, quam et pro spe salutis aeternae ad quam per fidem currimus, et pro sacra ordinatione, quam eo die à Reverendissimo Episcopo habere solenne est, et pro in commodis qua singulorum annorum revolutione consequimur Deo omnipotenti gratias agamus, etc. Tom. Concil. 4. Edit. Bm.*

These foure Fastis at this present day are observed in our ovne Church, and are known untous by the name of Ember-weekes. And so I finde it in Thomas Becon by opinion of much people, these dayes have beene called Imber-dayes, because that our elder Fathers would on these dayes eate no bread, but Cakes made under ashes, so that by the eating of that, they reduced into their mindes that they were but ashes, and so should turne againe, and wist not how soone, &c. And that these Imber-dayes were duly and devoutly observed by our Ancestours, wee may be perswaded out of the Lawes of King Canute: where it is said Chap. 16. *7 þ man ælc beboðam fæsten healde ry hit ymbren fæsten ry hit lengten fæsten ry hit eller oppe fæsten mid ealra geornfulnesse,* That every man observe the Fastis which are commanded, with all earnest care, whether it be the Imber Fast, or the Lent Fast, or any other Fast: And Chap. 17. *7 beo þam halgam tidum eal swa hit pih-t is eallum cnihtum mannum ryb: 7 rom gemene 7 ælc fæc to swames.* where the Law saith: That it is meet and right, that at these Fastis, all malice being laid aside, all men should be at peace. And concerning the outward observance in the 43. Chap. it is said: *ypel biþ þ man fæsten tide ær male etc. 7 gyt pýpre þ man mid fære mete hine sylfne ayle.* Evill it is, that upon a Fast day, a man should eate any thing till Meale-time, and it is much worse if he should eate flesh meate. This was the Religion of our Ancestours; and if ignorance could admit of so much devotion, how much more would bee expected from these knowing times?

Of wandering Clerkes, and how that they are not to be admitted to minister in another Diocesse, than where they are ordered, without the Dimissorie Letters of the Bishop, under whom they were ordered. Of Archdeacons, Archpriests, Sacristis, Vicars, what they are, and wherein their particular offices doe consist. Of the office of Judges in generall, and their power, whether they be Delegats, Legats *à latere*, or Judges ordinarie. Of difference in Iurisdiction betweene Ministers & Ministers, and what obedience the inferiour Ministers are to yeeld unto their superiours. Of Truce and Peace which Ecclesiasticall Judges are to procure; that truces be kept from Saturday in the Evening, untill Monday in the Morning, and that there be no fighting from the first day of the Advent, untill the eighth day after Twelfe-tide, and that warre likewise doe cease from the beginning of Lent, untill the eighth day after Easter, under paine of Excommunication, against him that presumeth to doe the contrary; and that in time of warre, neither Priests, Clerkes, Merchant-men, country-men, either going to the field or coming from the field, or being in the field, or the cattell with which they plough, or the seed with which they sow, be hurt or violated. Judges, before men enter into the dangerous events of Law, are to perswade the parties litigant by private covenants and agreements to compound the controversie betweene them, wherein if they prevaile not, then the parties are to provide themselves of Advocates, Proctors, or Syndicts according as they are private men, or bodies politick to furnish their cause, and direct them in proceeding.

If any Church hath beene hurt in any contract of bargain, or sale, or in dimising of any Lease, or by the Proctors negligence, it is to be restored againe into her former state, to alledge and plead that for it self, which is agreeable to Law & conscience. The like grace is to be granted to all other Litigants whatsoever, who have by feare or violence, or any other like unjust cause, beene hindered from the prosecution of their right.

If any, seeing a suit like to be commenced against him, doe either appeale before he be served with Proces, or alienate away the thing wherupon the suit was like to grow, he is to be compell'd

compell'd to hold plea of the same cause, before the Iudge from whom he did appeal, and to answer his adversary, as though still he were owner of the thing hee did in policie sell or alienate away.

Many times, things which otherwise can have no speedy end by Law, are compounded by Arbitrement. Arbitrators ought to be odd in number, that if they disagree, that which is concluded by the greater part may prevaile. An arbitrement is a power given by the parties litigant to some, to *Arbitrement,* heare and determine some matter in sute betweene them, and to pronounce upon the same, to which they are to bind themselves under a penaltie to stand.

S E C T. 4.

What is conteined in the second Booke of the Decretals.

THe first Booke having set out the first object of the Law, which standeth in the persons who make up the Iudgement, as in the person of the Iudge himselfe, the Advocates, Proctors, and Clients, there followeth in the second Booke, the second object of the same, which is the judgments themselves, which are to be commenced by a Citation, and that in a competent Court fit for the same, by a Libell offered up in the Court by the plaintife to the Iudge, which is to containe the summe of that which is required in judgement; where, if the defendant doe againe reconvent the plaintife, he is to answer, albeit the defendant be not of that Iurisdiction: the Libell being admitted, the defendant is to joyne issue, and yet before either of them enter any further into the cause, that there may be faire and sincere dealing in the same, and that all suspicion of malicious dealing therein may be taken away, each of them are to take an oath, the Plaintife, that hee doth not of any malice prosecute the sute against the Defendant, or the Defendant of any malice maintain the sute against the Plaintife, but that they verily beleeve their cause is good, and that they hope they shall be able to prove, the one his libell, the other his exceptions, if he shall put in any into the Court. The cause being

being begun, delayes are often granted, if either there come any holyday betweene, or any other like just cause be offered, as for producing of witnesses and such like: if there be no just cause of delay, then the Judge is to goe on in the due course of Law. (provided alwayes that more be not demanded by the plaintife than is due) and that the cause possessory be handled before the petitorie, and that hee that is spoyled, be first and before all things restored to that thing or place whereof he was spoyled, or from which hee was put; yea, though he have nothing else to alleadge for himselfe, besides the bare spoliation it selfe. If the one side or other wilfully or deceitfully decline judgement, the Judge is to put the other in possession of that which is in demand, or at the least, to sequester the fruits and possessions of that which is in controversie; but if both parties appeare and joyné issue affirmatively, then is it but a question of Law, and not of fact, neither doth there remaine ought else to be done by the Iudge, but that hee give sentence against him that hath confessed it, and put his sentence in execution. But if issue be joyned negatively, then is the plaintife to prove his Libell, so farre as it consists in fact, by witnesses which are to be compelled by Law if they will not come, or appeare voluntarily, by publick and private instruments, by presumptions, by conjectures, by oath; which being done, the Defendant in like sort is to be admitted to prove his exceptions, and cleere his prescriptions if he be able to alleadge any, in which he is Plaintife, neither is hee bound thereto, before the Plaintife have perfected and proved his owne right.

After proofes are brought on either side, and the same thoroughly disputed on by the Advocates, the Iudge is to give sentence, which he is to frame according to the Libell & proofes formerly deduced in the cause. The sentence being given, Execution is to be awarded, unlesse there be an appeale made from it within ten dayes by the Law (but fifteene dayes by the Statute of this Land) from the time the party, against whom sentence was given, had knowledge thereof, or unlesse it be appealed incontinently at the acts, and

and in writing before a publicke Notary, or at least the party against whom the sentence proceeded, with due time, take their journey toward the higher Iudge to prosecute the same, by whom the former sentence is either confirmed or infirmed, in the second instance.

SECT. 5.

What is the subject of the third booke of the Decretals.

THe third booke containeth such Civile matters and causes as are lyable to the Ecclesiasticall Courts, as the honest life or conversation of Clerkes, and their comely comportment in all their demeanour, with what women they are to cohabit, and dwell with, whereby they may be free from all suspicion of ill life, & with whom not, which of them may be married by the law of the Canons, and which not, in what cases they may be allowed to be non-resident, and in what not, and how such as are non residents may be called home unto their cure, and if they returne not upon proceffe sent out against them, how they are to be punished, namely by deprivation or sequestration of the fruits and commodities of their benefice.

Prebends and dignities are preferments for Clerks, but not for such as are idle or absent from the same without just cause: but if any Clerke or Minister be sicke, and his disease be curable, he is to receive the benefit of his prebend or dignity in his absence, as though he were present; but if it be contagious, or incurable, then he is to be put from the exercise of his office, and a helper or coadjutor to be joyned unto him, & they both to be maintained of his stipend.

Prebends or dignities are to be got by institution, which are to be given by the Bishop, or his Chancellour, or such other as have Episcopall jurisdiction, without which, neither any benefice is lawfully gotten, nor can lawfully be retained. Benefices not voyde, ought neither to be granted, neither to be promised; but such as are voyde ought to be granted within six moneths after knowledge of the voy-

dance thereof, otherwise the grant of them devolveth, and commeth unto the superiour: hee that causeth himselfe to be instituted into a benefice, the Incumbent thereof being alive, himselfe is to be deposed from his orders.

While any benefice, or Bishoprick is void nothing is to be changed or innovated in it; and such gifts, sales, or changes of Ecclesiasticall things, as are made by the Bishop, or any other like Prelate, without the consent of the Chapter, are void in Law: and such Benefices as doe become void, are to be bestowed without any impairing or diminution of the same.

In what case the goods & possessions of the Church may be alienated, and in what not; and that such things as are alienated, be alienated by the greater part of the Chapter, otherwise the alienation is void. What goods of the Church may be lent, what sold, what bought, what changed, what demised, or let to lease, what morgaged, or let to pawne. After these follow Tractates of last Wils and Testaments, of succession by way of Intestate, of Burials, of Tythes, first Fruits and Offerings: Of Monkes, and their state in sundry sorts; of the right of Patronage; of Synodals and Procurations: of consecration of Churches; of Celebration of Divine Service, and the Eucharist; of Baptisme, and the effect thereof; of a Priest not baptized; of Fasting, Purification of women, and other like ceremonies pertaining to Ecclesiasticall discipline: Of building and repairing Churches, and of their Church-yards, and the immunitie that belong to them both, and of sundry other thing in like sort pertaining to the Church. That Clerks and other Ecclesiasticall men trouble not themselves about Civile matters, contrarie to their office and profession.

SECT. 6.

What is contained in the fourth Booke of the Decretals.

THe fourth Booke disposeth of matters of Espousals and Matrimonie, and sheweth what words make Espousals,

what Matrimonie, of the betrothing of such as are under age, of clandestine Espousals and Contracts, and of what account they are to be had of in the Church, and how they may be made good: Of her that hath betrothed her selfe to two men, whose wife she shall be; what conditions may be put in espousals, and what not; what Clerks or Votaries may marrie, and what not: Of him that hath married her, with whom before he hath committed adulterie, and whether the same second Matrimonie be good, whereupon the resolution of the Law is, that if the woman knew not that he had an other wife, hee cannot leave her, his first wife being dead, under pretence he had an other wife alive when he married her; but if shee knew of it, and did joyne with him in practise for making away his wife, he cannot marry her, no though he were seperated from the other, as concerning bed and boord: Whether leproous men, and other which are infected with like contagious diseases may marrie, and whether being married, the marriage may not be dissolved upon this point: Of kinred Spirituall or Legall, and in what sort they hinder marriage; of him that hath knowne his owne wifes sister, or his owne cousin german, and whether this offence doe breake the Matrimonie that is contracted, or doe hinder the Matrimonie that is to be contracted: Within what degrees of consanguinitie or affinitie a man may marrie. Of such as are cold of Nature, or enchanted by Sorcery, whether they may marrie; the like respect is of women, who are unfit for men: Of such as marrie against the Interdict or prohibition of the Church, and what penaltie they incur: What children be held legitimate: who they be that may be accusers or witnesses in cases of dissolution of Marriages between man and wife: Of Divorces betweene man and wife, which are caused by the diversitie of mindes that are then betweene them, for that one seeketh to goe apart from the other; and in what cases divorces are allowed, and how many kinds there be of them: of gifts betweene man and wife; what securitie they have in Law, and that the Dowrie after the divorce

be restored to the woman, so that it be not in case of Adultery, and other such like filthinesse: Of second Marriages, in what cases they are to be permitted, in what not.

SECT. 7.

What is the subject of the fifth Booke of the Decretals.

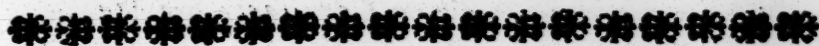
THe fifth Booke treateth of such Criminnall matters as are handled in Ecclesiasticall Courts, wherein the proceeding is either by accusation, whereto the Accuser doth subscribe his name, because it tendeth to punishment: or else by denunciation, whereto the Informer doth not subscribe his name, because it tendeth only to the amendment of the party: or by Inquisition, which for the most part, is not used, but upon some precedent, albeit sometimes it be without same: if once the same be prov'd, then may enquire be had of the truth of the fact: but yet without malice or slander. The Criminnall matters, which are prosecuted in the Ecclesiasticall Courts, and censured by Canonick punishments, are Symonie, and selling of Ecclesiasticall graces and benefices: whereupon Prelates are forbid to let out their Iurisdiccions under an annuall rent, and masters & Preachers to teach for money. The punishment of Jewes and Saracens, and their servants, that is, If a Jew have a servant that desireth to be a Christian, the Jew shall be compell'd to sell him to the Christian for xij. pence: That it shall not be lawfull for them to take any Christian to be their servant: That they may repaire the old Synagogues, but not build newe: That it shall not be lawfull for them upon good Friday, to open either their doores, or windowes: That their wives neither have Christian Nurces, nor themselves be nurces to Christian women: That they weare divers apparell from the Christians, whereby they may be knowne, and other ignominies of like sort. Who be Hereticks, and what be their punishments: who be Schismaticks, & what be their punishments: Of Apostataes, Anabaptists, & their punishments: Of those that kill their owne children, and their punishments: Of such as lay out young children, and other

other feeble persons to other mens pitie, which themselves have not, & how they are to be punished: Of voluntarie or casuall murders: Of Tilts, Barriers, and Tournament: Of Clerks that fight in combate: Of Archers that fight against Christians: Of whoredome, and adulterie, and how they are to be punished: Of such as ravish women, and their punishment: Of Thieves and Robbers: Of usurie and the paine thereof: Of deceit and falshood: Of Sorcerie: Of collusion and cosenage, and the revealing of the same: Of childrens offences, & that they are not to be punished with the like severitie as mens offences are: Of Clerks hunters, or hawkers, who if they often times use and sport themselves therein, if they be Bishops, they are to be suspended from the Communion three moneths; if Ministers or Priests two, but if he be a Deacon, he is to be suspended from his office: If a Clerk often times strike other men, and being admonished to forbear such kind of violence, doe nevertheless continue in his folly, he is to be deposed: If a Bishop cause any man rigorously to be whipt, he is to be suspended from saying service two moneths: Such as speak ill of Princes, and other like great persons spirituall or temporall, are to be punished, so that others by their example may take heed to speake ill, specially such as blaspheme the Majestie of the Almighty God: If Clerks excommunicated, deposed, or interdicted, or that came to the highest order without passing through the inferiour orders, or that came to the same order covenantously, and deceitfully: or being not ordered at all, or at the least not ordered lawfully, dare take upon them either to minister the holy Sacrament, or to say divine Service, they are to be deposed from their office, and from their benefice, and never after to be ordered: Prelates are not to greeve their subjects, either with rash suspension, or excommunication of their persons, or interdicting of their Churches, but they are to execute all those censures of the Church in judiciall order: they are not easily to suffer any man to hold two Benefices, where one may suffice, or to retaine any thing to his owne use, in a

* Other kinds of this vulgar Purgation were observed by the Ancients, as the triall by Water, by the Crosse, & by the body of our Lord, &c. and these were of ordinary use amongst our owne Ancestours, especially in the darker times. The *Saxon* (besides the triall by Combate, which they called Campe-fight) commonly used their fire and water Ordeals. Their triall by water was performed, either in hot or cold. In cold water the parties suspected were judged innocent, if their bodies were not borne up by the water, contrary to the course of nature. In hot, they were to put their bare armes up to the elbows, which if they brought out without hurt, they were conceived to be cleare of crime. They that were tryed by the Fire-ordeall, were either to passe bare footed over a certaine number of hot glowing ploughshares, or otherwise to carrie burning irons in their hands, a certaine number of paces, and according as they sped, they were judged nocent or innocent. This horrible experiment of Fire Ordeall in the first kind, was tried upon *Queene Emma*, the mother of *Edward the Confessor*, with a successe worthy of her chastitie. An example of the second kinde, and the like event, is recorded by *Eadmerus*, who relateth, that in the reigne of *William the second*, A company of fellows being suspected to have destroyed the Kings Deere, were enjoined for their triall, to carrie burning irons, which accordingly they did without hurt; the issue thereof being reported to the King, was entertained with such a remarkable indignation, that he furiously replied, *Quid est hoc? Deus est iustus Iudex? pereas qui deinceps hoc credideris*. How solemnly and superstitiously these Ordeals were performed; see *Lambard* out of his ancient Authour, in the word *Ordealium*. Reade also the *Saxon Lawes* of King *Æthelstane*, cap. 23. where it is said, that the party suspected, three dayes before his tryall, must goe to the Priest and heare Masse, and feed for that time upon bread, and salt, and water, and wurts, &c. See the rest in the Law. These kinds of purgations remained in use amongst our Ancestours, till the time of *Hen. the 3.* in whose reigne they began to be abolished, rather by desuetude and in reverence to this Canon Law, than by any Statute of the Realme: as learned Mr *Selden* hath observed in the Notes upon his forementioned *Eadmerus* p. 204. where also the Reader may see, how farre forth they were forbidden. Onely the tryall by Combate, though it be abrogated by the Canon heere, is notwithstanding permitted by the Law of this Land, but of very rare and considerate practice.

formed

formed by combat, and passing by burning fire, which is worthily rejected, for that thereby the innocent many times was condemned, and God thereby did seeme to be tempted: Of injuries and wrongs done: Of Ecclesiasticall punishments due to offences, among which one is, That so often as one offendeth, so often hee is to be punished: And that Prelates doe not take reward, to winke at men in their sinnes, or turne corrections into pecuniary paines, for gaine of filthy lucre: Of Penances and Pardons, or remissions: Of Excommunication, which is the greatest punishment in the Ecclesiasticall jurisdiction, and who, and in what cases men are to be stricken thereby.



PART II.

CHAP. I.

SECT. I.

What uses the Civile and Canon Law have in this our Realme; and that the Civile Law respecteth matters of ordinarie and extraordinary Cognisance.



F all those goodly & excellent Titles of the Civile and Canon Law, so full of wisdom, so full of variety, so well serving for every moment, and state of the common-wealth, in peace or in warre, as nothing can be more, the Professours thereof have very little use here within this Realme.

For first, for the Civile Law, (beside the two Universities of this land, that of *Oxford*, & the other of *Cambridge*, to whom the Kings of this Realme have granted a larger libertie, in the practise of these Lawes, then to any other place of the Kingdome; for that their purpose was, to have young men trayned up there, in a more ripe knowledge of these professiōs, that whē they came abroad, they might be more ready in all matters of negotiation and commerce, that the

Prince

Prince or State should have need of them to deale in with forreign Nations, when they were thereto called; to which the Lawes of this Land serve nothing at all, by reason of the difference that is betweene their Law, (which is either wholly the Civile Law, or for the most part grounded on it) & the Law of our nation) a very few Titles are left to the practisers thereof to deale in, & most of them seldome & rare in use, as shall be hereafter shewed, so that I may well divide all the profession of the Civile Law here with us, into matters Ordinarie and Extraordinarie.

SECT. 2.

That the matters of ordinary Cognisance are Marine, of which some are Civill, others Criminall, and what the Civill Marine matters are; and what manner of proceedings they have.

THe matters of ordinary cognisance of the Civill Law here in this Land, are Marine matters, of which some are Civill, some are Criminall.

Civill matters are those which concerne either the free use of the Sea it selfe, or the rights that men have to trade and traffique thereupon, or bargaines, sales, or contracts, or as it were contracts that are made or done beyond or upon the maine Sea, or any creeke thereof, or within as much space from the Sea, as the greatest winter wave runneth out, for any matter belonging to any negotiation or merchandize, or any other thing to the Ship or trade appertaining.

*ff ad legem Rho-
dan. de Faltu.
201. tit.*

And first for the use of the Sea it selfe; the Law holds it to be common, & that every one hath right to trade & traffique upon the same, so that it be without the prejudice of that Prince or Land, to whom the Sea is adjoyning. The like may be said for the shore it selfe, so that it be either for the refreshing of themselves with water, or victuall, or for the repaying of their Shippes, or buying any thing necessary thereunto, or it bee either for uttering of any commodity they

they have, or buying any thing againe of the people, upon whose land they touch: In which case it were barbarous to repell any, coming in peaceable manner; albeit it may happen upon some jealousie of the State, either for that it had some great forraine Enemy, whose continuall invasion they feare, or that the Sea coasts are much infested with Pyrates, that in this case resistance may be made; but when it is made manifest by flag of Truce, or otherwise, they are no other but well meaning men, they are to be entertained with all kindnesse.

For Contracts in Marine causes, some are Contracts in deed, some are as it were Contracts: Contracts in deed are all bargaines and sales whatsoever, made betweene Merchant and Merchant for any commoditie, fraught or traffique in the ship, or any sale or bargain made of the ship, or any thing thereto belonging, as Masts, cordage, anchorage, victuals, or any other thing of like nature, necessary for the imployment of the ship.

Those things which are as it were contracts, are those perpetuall rights, which are betweene the Purser or Master of the Ship, and the Passengers, or betweene one Passenger and another.

The perpetuall right which is betweene the Purser or Master of the Ship, and the Passengers is, that the Purser or Master be answerable for all such wares or goods as are brought into the ship, whether it be delivered to himselfe, or any of his Mariners: for he ought not onely to be just and honest himselfe, but also use the ministerie of honest people about him; and therefore the Master of the ship is no lesse bound for their persons than his owne. The Passengers againe are honestly and readily to pay the Master of the ship their fraught, and all such other charges of diet, and other provision as they have put him to; wherein if there be any default of any side, the Law affordes an action called *Exercitoria*, whereby the one or the other may be relieved.

The Master of the ship is he, who hath the charge of the whole

L. i. ff. de exercitoria action.

whole anchorage & government of the ship, and his office is either to let the ship to hire, or to buy and sell Merchandise, or to plie fares, or to provide tacle and furniture for the ship.

*D. ead. l. prima
§ 16. de exerci-
t. action.*

The Purser, whom the Law calleth *Exercitor Navis*, is he to whom all the profit or revenue of the ship doth come, whether it be in his owne right, or in anothers.

The perpetuall right that is betweene passengers and passengers, and saylers and passengers is, that in case of ejectments, and casting out of goods, and other merchandise into the Sea in time of tempests, or other danger, by rocks or quick-sands, for the lightning of the ship, because it is for the common good of all that are in the ship, and the preservation of the rest of the fraught of the ship, it be made up with the common contribution of all: for good reason it is, that they whose goods are saved hereby, should againe with their goods redeem the others losse, according to such proportion of goods, as they have in the ship, and the Law of the Sea allowes.

But in cases of Ejectments, the Law of the Sea is this, (which was taken from the people of *Rhodes*, who in old time were great seafaring men, and discoverers of sundry countries, whose rules even to this day are holden for good among all Marriners, for the great equitie and indifferencie that is in them) that as well the Master or Purser of the ship himselfe shall contribute for the preservation of his ship, as also the passengers for such ware as they have in the ship, of what sort soever it be, albeit happely it bee out of small weight, as pearles, pretious stones, and such like; and if perchance there be some passengers in the ship, who have no ware nor merchandise in it, yet because themselves are a burthen to the ship, estimate is to bee made of his or their apparell, rings, and jewels, according to which, he or they are to contribute towards the losse of such things as are cast out into the Sea: neither is there any thing in the whole ship excepted, save only those things which are put therein to be spent, for the common good of all, as victuals, fuell, and

and such like ; for those things are not brought in for any one private mans use, but for the benefit and service of all: and so much the rather, for that if victuals faile , or other like necessities want , every one must contribute thereto, or impart of that which he hath for his owne private provision ; but of mens owne bodies, unlesse they be servants, there is no rate to be set, because a free-mans body cannot be esteemed.

In pricing, estimate is to be made as well of those things which are lost , as those things which are saved , and the price is to bee set downe , not for how much they were bought , but for how much they may be sold, and that for the present, lest the contributors should be overmuch charged. Neither is it to the purpose that the goods which were lost, might have beene sold for more, for that herein regard is not to be had of the gaine, but of the losse. And if any thing that was throwne out were known to be decayed or made worse by washing with salt-water, it is not to be esteemed as a new fresh thing, but the price thereof is to be abated accordingly.

Now the contribution is to be made in this manner, first the losse is to be set downe, then the rate of those things which are saved , out of which must be drawne an equall portion , proportionable to the quantity of every mans goods he hath in the ship, to make up the losse, deducting out of the losers goods for himselfe , so much as is answerable to his proportion , so that he shall neither be made a cleere savor, nor a cleere loser , but in a certaine quantitie rateable to his part.

But this contribution is in that case to be made, if the ship be saved; for otherwise if a wrack happen, either before the ejectment, or in the ejectment, then whatsoever any of the vectors or passengers catch, is his owne; neither is there any regard to be had of the losse of the ship, or of the goods, unlesse perhaps afterwards they be drawne out of the Sea.

But here we are to note, that neither the things that are thus ejected, cease to be the first owners, neither become

that takes them up ; for because the first owner doth not count them for goods cast away , but still hee beares that minde to them , that if he may recover them, he will hold them as his owne goods , and in consideration of so much as afterward he shall recover , the contribution in the rest shall cease.

Neither if the Master of the ship himselfe by violence of the tempest, shall lose a Mast or a Saile, shall he be more allowed therefore, than a Carpenter to whom a house is let out to be built, shall be allowed for his axe or sawe, if hee breake it.

L. ne quid. ff. de incendio, ruinâ, & naufragio.

L. I. lib. II. C. de naufragiis.

Beside in matters of wrack, there is, as it were, a contract between them which have lost their goods by shipwrack, and them upon whose Lands the said goods are driven, that the same be restored to them or their heires, if they come in due time to claime the same : and therefore it is precisely forbid by the Law , that no man shall meddle with such goods as are wrecked, and such as are proved to have stolne any thing thereout are holden for robbers ; for that such goods being cast on land, & recovered out of the sea, remain still his who was the owner thereof, and descend upon his heire, neither excheat unto the King, neither to any other whom the King hath priviledged in this behalfe. And therefore the Emperour *Constantine* the great, saith worthily in this case; *If any ship at any time by shipwrack be driven unto the shoare, or touch at any hand, let the owners have it and let not my Exchequer meddle with it: for what right hath my Exchequer in another mans calamity, so that it should hunt after gaine in such a wofull case as this is?* And yet if this kindred appeare within a yeare and a day, or appearing, prove not the goods shipwracked to be theirs, the goods come to the Exchequer even by that Law : so much the Law condemneth carelesnesse, which is written *Vigilantibus & non dormientibus*. And with this agree the Lawes of this Land, as taken out of these imperiall lawes; whereby it is ordered that such goods as are saved out of the wrack, shall be kept by the view of the Sheriffe , or some other chiefe Officer, and

and delivered to the hands of such as are in the place where the goods were found, so that if any sue for them, & prove them to be his, or to have perished in his keeping, they shall be restored unto him without delay; otherwise they escheat unto the King, or to him to whom the King hath granted the same: And if any convey away any part of the same goods contrary to the Law, & be attainted therof, he shall be awarded to prison, and make fine at the Kings will, and yeeld dammages unto the party grieved: and a wrecke by the lawes of this land, is where all living things within the ship doe perish, * but if a man, a dog, or a cat doe scape out of the ship alive, it is otherwise.

For matters of contract, they are either in the petitorie, or in the Possessorie. The Petitorie is where the property of any thing is challenged, this of all other suites is the hardest, because the prooffe thereof is very difficult: for albeit the proprietie of things may be got by many meanes, as well be the Law Civill, as by the Law of Nations; yet it is not a thing so easie to be proved, for that there mult concur many things to the prooffe of a property, otherwise you shall faile in your suit, as in a case of bargain and faile, that there was such a contract between the buyer and the seller, that there was either money paid for it, or that he that sold it was content to take the buyers word for it, that delivery was made thereof, otherwise the property passeth not, but onely in some few cases, in which neither possession nor delivery is required. Lastly, that he which sold it was rightfull owner of it, otherwise can he not passe over any thing he had no right unto.

The Lordship or property of things, is bipartitie; for either it is direct or full, such as men have when they have not only the thing it selfe, whereof they are Lords or Proprietaries, but also the use and commodity thereof; or else it is profitable, as is the hold of Tenents and Farmers, who have the use, gaine, and possession of the thing, but the Lord the property and rent in acknowledgement of his right and Sovereignty.

The Possessorie is that right, whereby the use or possession of a thing is claimed, of which there be three sorts: for it is either in getting of the possession of that a man hath not, or in keeping of the possession of that a man hath, or in recovering and regaining of the possession of that which is lost.

The proceeding in all these Civile matters, is by Libell concluding to the action, the party agent giving caution to prosecute the sute, and to pay what shall be judged against him, if he faile in the sute; the Defendant on the contrary part, securing his adversarie by sufficient suertie, or other caution, as shall seeme meet for the present to the Judge, that he will appeare in judgment, and will pay that which shall be adjudged against him, and that hee will ratifie and allow all that his Proctor shall doe in his name: for to all these ends satisfaction in judgement is, which is nothing else but a course to secure the adversary of that which is in debate before the Iudge, that on what side soever the cause shall have an end, the clients may be sure to get that, which by Law shall be adjudged unto them.

S E C T. 3.

What are the Criminall marine matters, whereof the Law Civile holdeth plea here with us, and what proceeding they have.

ANd so much of those Civile Marine matters whereof, the Civile Law here in England usually holdeth plea. Now of the Criminall matters which belong to that Court, but yet by way of Commission from the Prince, and that is that horrible crime of Piracie, detested of God and man, the actors wherein *Tully* calleth Enemies to all, and to whom neither faith nor oath is to be kept.

Cicer. 3. lib. off.
* In an Attick
sense, for they
said πῆραν,

Ἀντὶ τοῦ ὀδῶν καὶ τέχνης, and from this sense, οἱ καὶ δάλασσαν κακῆρροι, were called πῆραι, Pirates, as the *Scholast* of *Sophocles* hath noted upon *Ajax*.

they

they pretend friendship, when they intend nothing else but robbery and blood-shed; or they are so termed of the word *πνεῦν*, that is, of their wandring up and downe, and resting in no place, but coasting hither and thither to doe mischief.

A Pirate is a Sea-thiefe, who for to enrich himselfe, either by subtilty, or open force, setteth upon Merchants and others, trading by sea, ever spoyling them of their loading, if they get the upper hand, and sometimes bereaving them of their life, and sinking of their ships.

The proceeding of these Criminall matters, is by accusation and information, and after by triall of twelve men upon the evidence, according to the lawes of this land, & the lawes of the ancient Feudes of *Lombardie*, where the like tryall is, and from whence, it seemeth, this of ours was first derived. But here must we note, that matters of reprisals are no piracies, although many times there falls out no lesse outrage in them, for spoyling and slaying of men, than doth in the other: for that Reprisals are done by the Princes commission, granted to the subject, for redresse of some injurie done to himselfe or his subject, by some other forreine Prince or subject, and amends hath beene required by law, and cannot be had, whereupon licence is given to the subject to releve himselfe by what way he can against the other Prince, or any of his subjects, by taking so much goods of his, as himselfe was indamaged; which course is held among Princes, the rather to afford Justice where it is lawfully demanded. *Bartol. l. nullus num. 2. C. de Judais & Cœlicolis.*

S E C T. 4.

That the things which extraordinarily belong unto the Cognisance of the Civile Law, are of three sorts, and concerning the first, which respecteth treaties betweene Prince and Prince.

AND thus much of the causes, which ordinarily doe belong unto the Cognisance of the Civile Law within this land.

land. Now it followeth, that I speake somewhat of those things wherein the Civile Law dealeth incidently, and by authority of the Prince, & is not the ordinary object of the Civile Law, howsoever otherwise they cannot be handsomely dealt in, but by such as have the skill of the Civile Law.

Whereof there be three sorts, the first is matters of forrein treaty betweene one Prince and another; the second is the ordering of martiall causes, whether they be Civile or Criminall in an Army; the last is the judgements of Ensignes and Armes, and the decisions for challenges of rights of Honour and precedencie, where any of them is in controverfie.

For the first, whereas all other Nations in compasse round about us be governed by the Civile Law, and treaties are to be decided by Law (both for those things which are in question, and to be concluded by Law, and for those things which are determined by consultation and agreed upon) who is thereto to be chosen rather than a Civilian, to whom their Law is knowne, as well as to themselves: and if perhaps he understand not their language; yet hee understandeth that language wherein the lawes themselves are written, and is the fittest tongue for treatises betweene Princes and Princes, because it is a common tongue to the learned of all the West part of the world; and thereby every Prince shall reteine his owne Majestie in parlying, as it were, in his owne language, and not be forced to speake in another Princes tongue, which, no doubt, is a great disadvantage to him that shall treat; for that every Nation hath some proper *Idioms*, not so well discerned by the booke speaker, as perceived by the Natives of the Countrey, where it is spoken, and wherein a stranger may easily be deceived.

How much forreine Princes doe esteeme of the skill of a Civilian in these matters, it may be understood thereby, that they never, for the most part send any Embassage for the treatie of any league or matter of commerce, but that one or moe of them are Civilians. And if the care of these things be so great with them, surely the estimation of the
same

same ought not to be light with us: for by what lawes their legues and negotiations use to bee directed, by the same must ours bee ordered, so that for that point, one kinde of learning must serve for both; for that otherwise one Nation will not be convinced by the other what their capitulations are.

Surely, such as over and besides their owne experience, have the knowledge of the Civill Law, have herein a double helpe above another man that wanteth the same. First, their owne understanding, which for the most part is of like proportion as other folks is: Then the skill of the Lawes themselves, which are a quintessence of wit above other humane learning, and were either wholly composed of the mature & deliberate resolutions of such Emperours as then swayed the whole world, or were the doomes & judgements of such wise men, as then managed the whole world, and the affaires thereof under them. But who, when hee seeth a sword in it's scaberd, knoweth whether it will cut or not, although the forme thereof be presumption, that it will: but, doe but draw it out of the scaberd, and try the blade thereof, and then shall you see the sharpenesse of it: I make no application hereof, for that my meaning by my words may be well enough knowne.

But in these matters, the wisdom of the State knowes best what is to be done, and I onely remember what other Nations doe, leaving the rest to their gravest considerations, who by precedents of former times, and men of experience, furnished with exoticke tongues, have carried this part of pollicie very well and safely hitherto: but now to the ordering of Martiall causes.

SECT. 5.

What are Martiall causes, which are second extraordinary matter belonging to the Cognisance of the Civill Law with us.

Martiall causes are either Civill or Criminall, where-
of both are determinable by the Civill Law. A Civill
Martiall cause, is where either the Captaine or the Souldier
requireth some thing that is due, & withholden from him,
as his stipend, his apparell, which among the *Romans* was
due twice a yeare, that is, their Sommer apparell from the
first day of April to the first of September, and their Win-
ter from thence to Aprill; his diet, which among the *Ro-*
mans was two dayes hard bisket, the third softer bread,
one day wine, an other day vineger, one day bacon, and
two dayes mutton; his priviledges either in cases of pre-
ferment, as to be removed from one degree to another, or
in cases of immunitie, as to be freed from all servile functi-
ons, and sundry other like, which a diligent reader may ga-
ther out of the titles of the Digest and Code of militarie
affaires, & other like titles which accompany them.

*ff. de re milita-
ri & C. eod. tit.
l. 12. ff. de pri-
vilegio vetera-
norum: & de
castrensi peculio
& C. eodem tit.
l. 12. C. de ero-
gatione milita-
ri annona &
C. de vest. mi-
litari.*

Souldiers faults are either proper to themselves, or com-
mon with others.

Those are common with others, which other men fall
into, and are corrected with like ordinary proceeding as
other crimes of like nature are, as man-slaughter, theft,
adultery, and such like.

Those are proper which doe properly appertaine to mi-
litarie discipline, and are punished by some unusuall or ex-
traordinarie punishment, as are these, not to appeare at Mu-
sters: to serve under him he ought not to serve: to vage or
wander long from the Tents, although he returne of his
owne accord: to forsake his Colours, or his Captaine: to
leave his standing: fly over to the Enemy: to betray the
Hoast: to be disobedient to his Captain, Coronell, or Lieu-
tenant, to lose or sell his Armour, or to steale another mans:

to

to be negligent in forage, or providing of victuall: to neglect his watch: to make a mutiny, to fly first out of the field, or other like, which are delivered in the late cited titles. Concerning this *Arrian*, who wrote the life of *Alexander* the great, thus saith; *Every thing is counted an offence in a Souldier, which is done contrary to the common discipline; as to be negligent, to be stubborne, to be slothfull.*

The punishments wherewith Souldiers are corrected, are these, either corporall punishment, or a pecuniarie mulct, or injunction of some service to be done, or amotion or removing out of their places, and sending away with shame.

By capitall punishment is understood for the most part death, or at the least beating, unlesse happily it be pardoned, either for the unskillfulnesse of the Souldier, or for the mutinie of the company, being thereto drawne by wine and wantonnesse, or for the miseration or pittie of the party offending.

All which a wise Judge moderateth according to the quality of the person, the quantitie of the offence, and the opportunitie of the time.

S E C T. 6.

That the third and last matter of extraordinary Cognisance in the Civill Law here with us, concerneth the bearing of Armes, and ranging of every man in his proper place of honour: and first of Armory.

THe last extraordinary matter that the Civile Law Judges dealeth in, is the bearing of Armes, and the ranging of every man in his roome of honour, according as his place requires: and here first of Armes. For skill in Armory, although it bee a thing now almost proper to the Heraulds of Armes, who were in old time called *Feciales*, or *Caduceatores*, because they were messengers of warre and peace; either to proclaime the one, or denounce the other: yet the ground thereof they have from the Civile Law, so that

thereby to this day they may be directed in their skill, or controlled if they doe amisse.

*C. ut nemo pri-
vatus pradiis*

*suis, vel alienis
vela regia im-
ponat, ut nemi-
niliceat sine*

*Iud. autho. sig-
na imponere. &*

*c. De statu &
imaginib, ut
nemini liceat
signum salva-
toris, &c.*

*De his qui po-
tentiorum no-
mine titulos
pradiis suis
affigunt, & ibi
doct.*

*ff. de rerum di-
visio. l. san-
ctum.*

*C. de ingenuis
& manumiss.
l. ad recognos-
cenda. ff. de re-
rum divisione
l. sanctum.*

*C. de mutatione
nominis l. 1. ff.
de Falsis, l.
falsi nominis.*

For besides, that there are many other places in the Law which touch Armory, as appeareth by the titles here quoted in the margent, *Barthol.* himselfe maketh a speciall tractate thereof, and divideth the whole matter of Armes into three ranks, according to the divers sorts of men that bare them: for some are Armes of some publick dignitie and office, as the Armes of the Legate, or Proconsull, the Armes of Bishops, the Armes of the Lord Admirall; other are Armes of speciall dignities, as Armes of the Kings and Princes, which no man is to beare or paint in his house or stufte, unlesse it bee for to shew his duetie or subjection therein.

The third sort is of those, which are private mens Armes, of whom part have them by the grant of the Prince, or by authoritie of those, to whom the Prince hath given power to grant Armes to others, as hath the Earle Marshall within this Realme of England; others have taken them by their owne authoritie, which albeit in former times they might doe, as also they might take such names as every one did like of (for names and signes in the beginning were invented, for to know and discern one man from an other) and as every man might change his name, so might hee change his signe, so that it were not done in fraud and deceit: but after it was forbidden, both that any man should change his name, because it was not thought it could be done with any good meaning, & that no man should beare Armes of his owne authoritie; and therefore Officers were appointed under Princes (as I have said) who should give Armes to such as deserved well of the common-wealth either in warre or peace: for albeit in the beginning Armes and Colours were proper to men of warre, to avoid confusion in the hoast, and to discern one company from an other, yet when it came to be a matter of honour, it was challenged no lesse by men of peace, than by men of warr; for true indeede is that saying of *Tully*, *Parva sunt foris*

arma,

arma, nisi est consilium domi: and the Emperour speaking of the benefit that Advocates, and such like bring to States & Common-wealths, saith thus, Advocates which breake the doubtfull fates of causes, and with the strength of their defence sundry times, as well in publick causes as in private, raise up those that are false, and releeve those which are wearied, doe no lesse good unto man kinde, than if by warre and wounds they saved their parents and countrey: for we (saith hee) doe not count, that they onely doe warre for our Empire, which doe labour with sword, shield, & target, but also our advocates, for indeed the Advocates or Patrons of causes doe warre, who by confidence of their glorious voyce doe defend the hope, life, and posteritie of such as be in danger: thus saith hee; and thereupon commeth that distinction of *Castrense peculium, Et quasi castrense peculium*, signifying thereby, that albeit Counsellours to the State, Lawyers, & such like be not actuall warriors, yet they are representative warriors, and doe no lesse serve the Common-wealth, than they. The Souldier riseth betime in the morning, that he may goe forth to his exploit, the Advocate that hee may provide for his Clients cause; hee wakes by the trumpet, the other by the cock; he ordereth the battell, the other his Clients businesse; hee taketh care his tents bee not taken, the other that his Clients cause be not overthrowne: so then either of them is a warrior, the one abroad in the field, the other at home in the Citie. Besides *Barthol.* treateth in that place, what things are borne in Armes, either naturall, as beastes, birds, fishes, mountaines, trees, flowers, sunne, moone, starres, or such like: or artificiall, not taken from things existent, as colours, simple and mixt, divided by halves or quarters, or by lines, direct, crosse, overthwart, or such other; then how each of these is to bee carried, wherein Art must follow Nature, that every thing figured, be borne according to the nature of that which it doth figure, and not otherwise: and therefore as in ensignes, flagges, or standards, the speare or shaft goeth before, & the streamer or colours

*L. Advocati C.
de Advocatis
diversorum ju-
diciorum.*

follow after, so the face of every creature that is figured or described in the banner or hatchment, must looke unto the shaft or speare; unlesse a man beare two creatures, one looking toward the other, for then this observation hath no place, for vaine it is to conjecture where things are certain, otherwise it is the nature of the face to goe before, and the body to follow after: and the like reason is of the parts of every creature which is likewise borne in Armour, which are distinguished by before and behinde, whose site must be such, that the head looke to the speare, otherwise would it seeme to goe backe like a monster: but if the forepart alone of any creature be born in a Scutcheon, as often it happeneth that men give onely a Lyon, Beare, or Bulls head for their Armes, then must not the head directly look upon the shaft, but aside: further, every of these creatures be so described in the coate, as his vigour and generositie be best set out, whether it be a fierce or savage beast, or a milde and gentle creature. But for colours, his rule is, that the noblest colour be put in the first part of the field, howsoever the coate be divided, quarter or pale. And of colours, the golden colour is the chiefeft, as that which doth figure the Sunne, which is the fountaine of light, which is most acceptable to every mans eye. The next is Purple or Red, which doth figure the fire, that is the highest and noblest of the foure Elements, and next the Sunne it selfe in dignitie. The third is Blew, of the Heralds called Azure, and *Ceruleus* in Latin, which figureth the Aire, which is a cleere and transparent body, and most capable of light, and commeth in nobility next after the fire. The fourth is White, which commeth neere to the Light, and therefore is more noble than Black. that draweth neere to darknesse, and therefore is the basest of all Colours. And for mixt colours, as every one hath more or lesse of White or Black, so either they are nobler or baser in reputation and degree. And thus much in generall as concerning the knowledge of Armes.

SECT. 7.

Concerning the Places and Successions of Princes, and other honorable Personages, and first of their places.

NOW followeth what the Civile Law holdeth, as concerning Princes, and other honourable Persons, and their successions and places, which a grave Iudge of this Land hath anciently acknowledged to belong unto the Civile Law. *Nedham 37.
Hen. 6. fol. 21.*

By the Civile Law, all power commeth from God, as the Scripture teacheth, and among powers the two greatest are the Empire, and the Priesthood; for as God hath ordeined the one to rule the outward man, & to bring all his actions within the compasse of reason, & so to establish commonwealths, and to order the same: So also hath he provided the other for the instruction of the inward man, and the planting of Religion among men.

By the Empire, I understand, not onely the Empire of Rome (which sometimes bare rule over most part of the world, at the least ten mighty Kingdomes, which now are growne into particular Empires, and Monarchies themselves) but also every severall Kingdome, which acknowledged no other Emperour than his owne Sovereigne; for howsoever they differ in name and title, yet is the office it selfe all one: For every one of them is Gods immediate Vicar upon earth in their owne kingdomes, for matters appertaining unto Iustice. Whereupon the Civile Law gives them very honourable titles, sometimes tearing them Gods upon earth, for the great authority they have over other men under God; sometimes Ministers of God, for the service they doe God in their commonwealths; sometimes most holy, and most religious, for the care they ought to have about Religion, and correcting of those things which are done against the feare of God; for a King ought in all things to propound the word of God before him for his rule, and to follow the doctrine of the Apostles; sometimes they

ff. de leg. 2. l.

ff. de legat. 2. l.

C. 4. tit. 13.

C. 1. tit. 13. l. 56.

C. 1. tit. 1. l. 5.

C. 1. tit. 3. l. 5.

they are called most milde, because a King in all the course of his life, but specially in matters of punishment ought to imitate the mercie and favour of Almighty God.

C. 5. tit. 4. l. 23.

*L. fin. C. de ver.
signif. c. de dig-
nitat. l. 8. dis. 12.*

*1 Petric. 2.
ver. 13.*

*Ab. c. signific.
via ext de pe-
nitentia c.
C 6 t. 23. l. 19.
C. de testib. l.
omnium.*

Although the Emperour or King be reckoned among his Nobilitie, because he should not be puffed up with the glorie of his place, & conceive he were of more excellent mould than the rest, when indeed wee are all of one, and the selfe same clay; yet he is both by the ordinance of God and man *ὡς ὑπερέχων*, (as the Apostle tearmes him) among them, that is, one who is supream Sovereigne above the rest, and whom they ought in all things to obey, so it be not against the Law of God, and common Iustice; for himselfe is in steed of the whole Law, yea he is the Law it selfe, and the onely interpreter thereof, as in whose breast is the whole knowledge of the same; which albeit the Doctors doe hold with a qualification, as thereby understanding, not onely the Princes person, but also his Chancellours, both which put together, make up a perfect state of a Prince: yet forasmuch as all that benefit of wisdome and government that commeth from them unto the Common-wealth, is principally derived from the Prince, as from the head, who hath vouchsafed to make them, as it were members of his body, and so by them to derive the power of his government unto all; it may be rightly said, that in the Princes breast resteth the fulnesse of all knowledge, for the well ordering of his common-wealth; for what they see, they see for him, what they heare, they heare for his use, what they understand, they understand to doe him service, & so consequently of the rest of the actions of the minde & body they obey the Prince as their Sovereigne: so then as the Prince hath the primacie in the government of his common-wealth, and all those which governe under him, governe by, and for him; so also hath he the precedencie, and *protoclisie*, or foresitting in all assemblies before the rest, and such other as have precedencie or foresitting, have it by the Princes indulgencie.

*C. 7 tit. 37 l. 3.
in principis*

Next unto the Prince is his Queene, who shineth by the beames

been question for precedencie, since either of them hath bin in credit in Common-weales, as may appeare both by the comparison that *Tully* maketh betweene *Lucius Murena*, a Knight of Rome, and *Publ. Sulpitius* a Lawyer, either of them standing for the Consulship, in his elequent Oration made for *Murena*, and many disputes of *Bartol* and *Baldus*, arguing the case to and fro, which although it be yet disputable in forreine Countries, where the Civile Law is in credit; yet here among us where all preferment is taken from it, and the Professours thereof are shut up, as it were, into a narrow corner of their profession, it is without controverſie, and the prioritie thereof indubitable: but yet this is the resolution of those which are learned in this point, that in such acts as concerne learning, a Doctour is to bee preferred before a Knight, but in acts that concerne militarie knowledge, a Knight takes place before a Doctor: but in other acts which are neither proper to the one, nor to the other, first are preferred such Doctors as attend about the Prince; secondly such Knights as waite upon the Prince; thirdly such Doctors as being not about the Prince, are excellent in learning; fourthly come Knights without any place of preferment; lastly Doctors of meaner gifts and place.

*Chassaneus de
gloria mundi
lib. 9.*

Although by the Civile Law there bee no Gentlemen of title under Knights, but all the rest went under the name of people, yet in other Common-wealths there are, and with us bee, even in this ranke, which have names of preheminance, whereby they are in degree above the rest; as with the French there are *les Gentilhommes*, and *le Gens de ordinances*, and with us are Squires and Gentlemen, all which give Ensignes or Coat-Armours, and thereby are distinguished from the meaner people: in which respect *Bartol* calleth them Noble, but yet of a weake nobilitie, for that it hath no further prerogative in it, than that it makes them differ from the baser sort of people.

*Bartol tractat.
de Insign.*

Of these two sorts of Gentlemen with us, the Squire
hath

hath the priority, * who seemes by the common name we give him in Latine, to have had his origen, either for that hee carried the Armour of the King, Duke, or other great personage, as wee see not onely in holy Scriptures *Saul* and *Jonathan* had their Armour-bearers; but in Poëts and other prophane stories, *Patroclus* was *Achilles* Armour-bearer, and *Clitus* great *Alexanders*: whereupon some write that *ὀπλίτης* *five* *ὀπλοφόρος*, which is he whom we call *Armiger* in Latin, is a footeman, that with a speare, shield, or head-piece, followeth an armed Knight in battaile, or rather as some other suppose, it is the footeman himselfe armed in the field: howsoever the word be taken, this is sure, that these were men of good account in the old time, as those which won themselves credite out of warre, and so their estimation remained in their posterity; and as those were in time before, so are these which are in our dayes, as descending, for the most part, from their worthy Ancestours.

There is no dubbing or creating of these by the Princes hand, or him to whom the Prince hath given authority, as it is in the creating of the Nobilitie, and the making of Knights, but every one whom the Captaine hath vouchsafed that service, is by the service it selfe a Squier; and that not onely hee which hath done the service in warre, but also such which have done any equivalent service in peace, as Lieutenants, and Sherifes of Shires, and Iustices of Peace within their Countie: for even in this, as in other Promotions hath that distinction of the Law place, of *Castrensis peculii*, & *quasi castrensis*, whereby service of the Common-wealth at home, is levelled and made equall with that abroad. Gentlemen have their beginning either of bloud, as that they are borne of worshipfull parents, or that they have done some thing worthily in peace or warre, whereby they deserve to beare Armes, and to bee accounted Gentlemen, for he is a Gentleman who is commonly so taken and reputed.

Homer. Iliad. plin. lib. 35.

natural. hist.

* And so it might have seemed by the English name, for though we now call this kinde of Gentleman an Esquier, yet our Ancestours called such a one *Scyld-mapa*, a shield-knave, that was the knave (or as we say now, the boy or servant)

that used to beare a shield or other Armour after his Master in the warres: and this is answerable to the Latine *Armiger*, and to the originall of the dignitie; whereas the word *Esquier* (which we now use) from the French, properly noteth another thing.

L. 1. c. de dignitat. lib. 10.

12.

And this is the last and lowest order of them to whom Law doth allow any challenge of precedencie.

S E C T. 8.

Concerning the Succession of great Personages in their places of Honour.

NOW it followeth, that I speake something also, how great personages one succeed another in their places of honour.

And first, to begin with the Empire it selfe, as the greatest earthly dignitie under God, albeit in the beginning it were raised up by no right, but by usurpation, *Julius Caesar* changing the former government of the State, and challenging to himselfe the whole managing of the same; yet after it came to an orderly course; inso much as hee that had the present possession of it, disposed it to his best liking by his last Will and Testament. So *Julius* himselfe devised it to *Octavius* his sisters sonne: and albeit that devise took not effect, by reason of the treason that was wrought against *Julius* owne person, so that *Octavius* was faine to recover it by another right, even by the death of *Lepidus* and *Antonius* his colleagues in office; yet that very Will of *Julius* gave a pretence to *Octavius*, who after was called *Augustus* (because hee did increase the Empire with many worthy Victories) to stand for the inheritance of the Empire; in consideration of which title the Senate and people of *Rome* more easily submitted themselves unto his government. *Augustus* in like sort bequeathed it to *Tiberius*, and *Tiberius* to *Caius*: and so it came from one to another, untill some of them by cruelty and licentiousnesse of life, became so odious to God and man, that the people rose against them, and bereft them of that liberty, which they had prescribed in appointing of their Successors, and somewhiles themselves, and somewhiles the Souldiers made choise of whom they thought good, or by whom they thought best to be rewarded. And thus the right of Succession

tion unto the Empire, was tost up and down many hundred yeares betwixt Inheritance, Bequest, and Election, untill at the last, it came unto that established state, as now it is in, and settled Electours of the Empire, so often as it happened to be voide. Succession in Kingdomes, in most part of the world, in former time hath beene, and at this day is by right of bloud, (a few onely excepted, which are Elective, as the Kingdome of *Poland* is at this day) and in Succession the eldest sonne taketh place before the rest; and if there be no heire male, then the eldest daughter succeedeth in the Kingdome, and her issue: for Kingdomes (as also succession in other dignities) are impartible. And yet *France* (to exclude *Edward* the third from the inheritance of the Crowne thereof, who descended of *Isabel* the sister of *Charles* the faire, and so was next heire male unto the Kingdome of *France*) alleadged for themselves the Law *Salick*, pretending none which claimed by the woman, albeit he were the next heire male in bloud, was to succeed, as long as there were of the male line alive, how farre so ever they were off in degree from the last King deceased. But this is but a meer device of the *French*, fathered upon some rotten Record of that part of their Nation, called *Salii*; of whom otherwise they have nothing memorable to speake of, as being the basest Nation among them all, of whom they report their people to have bin compounded: but this devise served their turne then, whether it were anciently invented, or newly coyned. But howsoever they oppose themselves against womens government, as *Bodine* their countrey-man hath of late stretched out the strength of his wit to devise reasons against the government of that sexe: certaine it is, that the Law of God hath allowed it, as it appeareth in the example of *Debora*, who being a Prophetesse governed *Israel* fortie yeares, and by her direction got the *Israelites* a mightie victorie over *Sisera* the Captaine of the hoast of *Jabin*: and we among other Nations, have found by experience, *gunaicocratie*, or womens government is nothing so unfortunate, as *Bodine* would make us beleieve it is.

*Bodin. lib. 6. de
repub.*

For both in our late Queene, and also in her sister, (except only the case of Religion, wherein she followed the error of the time, and was carried away more with zeale than knowledge, and thereby is more to be pitied than to be envied) what is in their government, the wisest Man-Prince in the world would not desire to be in his owne Regiment? for what is either in their private carriages, (so you give no eare to virulent and malicious tongues, who report surmises for substances, and tales for truths) or in their publicke government, (so you lay not other mens faults to their charges) that any man may justly blame? For that I may passe over the rest of their Heroicall vertues, fit for women of their State (specially the late Queene, who was peerelesse among all Queenes that ever went before her, & unmatched, as I verily doe beleeeve, by any that ever shall succeed her) as their magnanimity whereby they subdued, not only their domesticall enemies, but vanquished even their foraine foes, were their designements never so dangerous, not shewing any token of discouragement, either in the treasonable attempts of the one, or in the malicious complotments of the other.

What an excellent worke of hers was that, that then when all her neighbour Kingdomes round about her were drunke with the cup of the fornication of the whore of *Babylon*, she alone came out of *Babylon*, and so continued constant to the end, maugre the threats of the red fierie Dragon, and the flouds of water he cast out of his mouth after her? How excellent did she shew her selfe in these two vertues which doe chiefly preserve Princes States, that is, Mercy and Judgement, the Records of her time doe shew, so that I may spare to remember any by name, which happily would not be well taken.

And yet, truth it is, that mens government is more agreeable to Nature than womens is, whom God in the beginning put in subjection under man, and who for the most part are by nature weake in body, and thereby unable to put in execution the great affaires of a Kingdome, and unsettled

settled in Judgement, and so hardly can determine that which is right, and settle themselves thereupon: yet by the numeration of certaine ill governing Queenes, to conclude a generalitie against all government of women, is but an ill kinde of arguing; for even by the like reason a man might conclude against Kings, of which sort, although there hath beene many good, whom God hath used as instruments to worke great good unto people in every Kingdome, yet more of them have beene evill, as the Stories of every country will shew; and to abridge God of his power, that hee cannot as well governe by a woman as by a man, when it is his good pleasure so to doe, were great injurie to God, and a great discredit to all woman kind: but to returne thither where I left.

In succession of Kings a question hath beene, where the King hath had sons both before he came to the Kingdome and after, which of them is to succeed, he that was borne before the Kingdom as having the prerogative of his birth-right, or he that was borne after, as being brought into the world under a greater planet than the other, neither hath there wanted reason or example for each side to found themselves on: for *Xerxes* the son of *Darius* King of *Persia* being the eldest birth after his father was enthronized in the Kingdome, carried away the Empire thereof from his brother *Artemines* or *Artobazanes* borne before his father came to the royall possession thereof: so *Arseces* the son of another *Darius* borne in the time of his fathers Empire carried away the garland from his brother *Cyrus* borne before the Empire: so *Lemes* Duke of *Millan* born after his father was Duke, was preferred to the Dukedome, before his brother *Galliasius* borne before the Dukedome. But these examples notwithstanding, and the opinion of sundry Doctors to the contrary, common use of succession in these latter dayes hath gone to the contrary, and that not without good reason: for that it is not meet, that any that have right to any succession by the prerogative of their birth-right, (such as all elder brethren have) should be despoiled thereof,

Herodot. lib. 4.
Justin. lib. 11.
Plutarchus in
vita Artaxer-
xii.

Guicciard. l. 1.
Histor.
Blondus Decad.
2. lib. 6.
Much. Ristius. 2.
de regib. Hun-
gar. Sigeb. in
Chronic.

of, except there be some evident cause of incapacity to the contrary.

*Bartol. l. si vi-
va matre c. de
bonis maternis
primegeniti filii
non excludunt
secundo-genitiū
in regno.*

*ff. de liberis &
posthumis l. in
fuss.*

*Pausanias lib.
3. Histor.*

*Plutarch in vi-
ta Lycurg.*

Besides, sundry contentions have risen in kingdoms between the issue of the eldest sonne of the King dying before his father, and the second brother surviving the father, who should reigne after the father, the Nephew challenging the same unto him, by the title of his fathers birth-right, and so by the way of representation; for the eldest sonne, even the father yet living, beares the person of the father, how much then rather his father being dead? Whereupon the Law calls as well the sonne *Filiusfamilias*, as the father *Paterfamilias*, for that the sonne, even during the fathers life, is as it were Lord of his fathers estate: the other claiming as eldest sonne to his father at the time of death; upon which title, in old time there grew a controversie betweene *Arens* the sonne of *Acrotatus* eldest sonne to *Cleomines*, King of *Lacedamon*, & *Cleomines* second son to *Cleomines*, and unckle to the said *Arens*, but after debate thereof, the Senate gave their sentence for *Arens* right, against *Cleomines*: besides *Eunomus* King of *Lacedamon* having two sons, *Polydectes* and *Lycurgus*, *Polydectes* dying without children, *Lycurgus* succeeded in the kingdome, but after that he understood *Polydectes* widow had a child, he yeelded the Crown to him: wherein he dealt farre more religiously than either did King *John*, who upon like pretence, not onely put by *Arthur Plantaginet* his eldest brothers sonne, from the succession of the Kingdome, but also, most unnaturally, tooke away his life from him; or King *Richard* the third, who most barbarously, to come unto the Kingdome, did not onely slay his two innocent Nephewes, but also defamed his owne mother, in publishing to the world, that the late King his brother, was a Bastard. Our Stories doe not obscurely note, that a controversie of like matter, had like to have growne betweene *Richard* the second, and *John* of *Gaunt* his uncle, and that he had procured the counsell of sundry great learned men to this purpose, but that hee found the hearts of sundry Noble-men of the Land, (and specially the Citizens

of

of London) to be against him; whereupon he desisted from his purpose, and acknowledged his Nephewes right. Yet notwithstanding, whē as *Charles* the second King of *Sicilie* Vicerius in vi-
ta Hen. 7. departed this life, & left behinde him a Nephew of *Charles* his eldest sonne, surnamed *Martellus*, and his younger son *Robert*, and the matter came in question which of them should succeed, *Clement* the fifth gave sentence for *Robert* the younger sonne of *Charles* deceased, against the sonne of *Martellus*, being Nephew to his Grandfather, and so caused the said *Robert* to bee proclaimed King of *Sicilie*; which was done rather upon displeasure, that Pope *Clement* conceived against the Emperour *Frederick*, than that there was just cause so to doe. And yet *Glanvill*, an old reverent Lawyer of this Land, and Lord chiefe Justice under *Henry* the second, seemeth to make this questionable here in England, who should be preferred, the Uncle or the Nephew. Clem. c. pastorali de re judica-
ta.
Glanvill l. 7. c. 3.

And thus much of succession of Kings, wherein the eldest among Males hath the prerogative, and the like in Females, if there be no Male: for that a Kingdome is a dignitie undivisible, and can come but to one, be he Male or Female; for that otherwise great governments would soone come to small Rules and Territories.

And the like that is said of Kingdomes, is to be held of all Dignities under Kingdomes, where the eldest sonne is to be preferred before all his other brethren, & they successively one before another, if there be no issue left of them that goe before; and the Male line is to be preferred before the Feminine, and the Feminine before all the rest of the kinred, so it be not a Masculine Feud, and the same intailed upon the heire Male.

And thus farre, as concerning the matters wherein the Civile Law dealeth directly or incidently within this Realme. Now it followeth, to shew how much of all those Titles of the Canon Law, which have beene before set downe, are here in practice among us.

C H A P. II.

S E C T. I.

*Concerning the use which the Canon Law hath in this Realm:
That some Titles thereof are abolished onely individuallly,
and some others are altogether.*

OF those Titles of the Canon Law, which before have beene recited, some are out of use here with us in the singular or *Individuum*, by reason of the grosse Idolatrie they did conteine in them; as the Title of the Authoritie and use of the Pal, the Title of the Masse, the Title of Reliques and the worship of Saints, the Title of Monks and Regular Canons, the Title of the keeping of the Eucharist and Creame, and such other of like qualitie: but yet are reteined in the generall: for in stead of them, there are substituted in their places holy worships, tending to the like end of godlinesse those other did pretend, but voide of those superstitious meanes the other thought to please God by; and so in stead of the Masse, hath come in the holy Communion; and in place of worshipping of Saints, hath succeeded a godly remembrance, and glorifying of God in his Saints, and so of the rest, whereof there is any right use within the Church.

Some other are out of use as well among the Civile as Criminall titles, because the matter that is therein treated of, is knowne notoriously to belong to the conusance of the Common Law at this day, as the Titles of Buying and Selling, of Leasing, Letting, and taking to Farme, of Morigaging and Pledging, of Giving by deed of gift, of Detaining, of Collusion and Cosenage, of Murder, of Theft, and receiving of Theeves, and such like.

S E C T. 2.

S E C T. 2.

That the Titles lastly mentioned, did anciently belong unto the Court Spirituall, and the Reasons which moved the Author so to beleieve: The first Reason.

ANd yet, I doubt not, but even these matters, as well Civile as Criminall, or most of them, were anciently in practise, and allowed in Bishops Courts in this Land, among Clerks, to the which I am induced by three Reasons: First, that I finde not onely the forrein Authors of the Decretals, but all the domesticall Authours of the Legatines, being all most excellent wise men, as the Stories of their severall ages do report, to have enacted these severall constitutions, and to have inserted them, not onely in the body of the Canon Law, but also in the body of the Ecclesiasticall Lawes of this Land; and that some wise men, sundry yeares after their ages, doe write and comment upon the same, as things expedient and profitable for the use of the Church, and the government of the Clergie in those dayes; neither of which, I doe presume, they would have done, if in those ages there had not beene good use and free practice of them.

S E C T. 3.

The second Reason.

SEcondly, that I finde in the Code of *Justinian*, by sundry Lawes, some of his owne making, some others of other Emperours before his time, even from the daies of *Constantine* the great, Bishops in their Episcopall audience had the practice of these matters, as well Criminall as Civile; and to that end had they their Officials, or Chancellours, whom the Law calleth *Ecclesiedici*, or *Episcoporum Ecdici*, that is, *Church-Lawyers*, or *Bishops-Lawyers*, men trained up in the Civile and Canon Law of those ages, to direct them in matters of Judgement, as well in Ecclesiasticall Criminall matters, as Ecclesiasticall Civile matters.

And that these which now are Bishops Chancellours, are the very selfe same persons in Office, that anciently exercised Ecclesiasticall Iurisdiction under Bishops, and were called *Ecclesiedici*, it may appeare by that which *Papias*, an old ancient Hiltoriographer cited by *Gothofred*, in his Annotations upon the foresaid Law *Omnem* in the Code, & title *de Episcopis* and *Clericis*, and upon the *s. Præterea*. writeth of them, who saith thus, That *Ecclesiedici* or *Ecdici* were those that were aiders & assilters to the Bishops, in their Iurisdiction, not astrict or bound to one place, but every where through the whole Diocesse, supplying the absence of the Bishop, which is the very right description of the Bishops Chancellours that now are; who for that they carry the Bishops authority with them every where, for matters of Iurisdiction, and that the B. and they make but one Consistory, are called the Bishops Vicars generall, both in respect their authority stretcheth it self throughout the whole Diocesse, and also to distinguish them from the Commissaries of Bishops, whose authority is onely in some certaine place of the Diocesse, and some certaine causes of the Iurisdiction, limited unto them by the Bishops, and therefore are called by the Law, *Judices* or *Officiales foranei*, as if you would say, *Officiales astricti cuidam foro dioeceseos tantum*.

Gloss. in Clement. 2. de Rescript.

See the Confirmations touching the Church of England. fol. 8. b.

Baldus l. ali quando ff. de officio Proconsulis.

Covar. li. 3. variarum resolut. c. 79. num. 4.

Sbrozini lib. 1. de vicario Epif. q. 46. num. 2. 4. 12. c. 13.

So that it is a very meeere conceit, that a certaine Gentleman, very learned and eloquent of late hath written, That Chancellours are men but of late upstart in the world, and that the sloath of Bishops hath brought in Chancellours, whereas in very deed, Chancellours are equall, or neer equall in time to Bishops themselves, as both the Law it selfe, and Stories doe shew: yea Chancellours are so necessary Officers to Bishops, that every Bishop must of necessity have a Chancellour; and if any Bishop would seeme to be so compleat within himselfe, as that he needed not a Chancellour, yet may the Archbishop of the Province wherein he is, compell him to take a Chancellour, or if he refuse so to doe, put a Chancellour on him: for that the Law doth presume, it is a matter of more weight, than one man is able to sustain to governe

governe a whole Diocesse by himselfe alone ; & therefore howsoever the nomination of the Chancellour bee in the Bishop, yet his authority comes from the Law, and therefore he is no lesse accounted an Ordinarie by the Law, than the Bishop is. But truth it is, not the sloth of the Bishops, but the multitude and varietie of Ecclesiasticall causes brought them in, which could not be defined by like former precedents, but needed every one almost a new decision. And the reasons why Princes in the beginning granted to Clergie men these causes & their Consistories, (for from Princes were derived in the beginning all these authorities, as also the Religion it self is settled & protected in kingdoms by Princes, before there can be had a free passage thereof) were. First that the Clergie men therby might not be drawn from their prayer and exercise of divine service, to follow matters of suits abroad: 2^{ly}, that they were like to have a more speedy & better dispatch, & more indifferency before a Iudge of their owne learning, than before a Iudge of another profession; for this is true, and ever hath beene, and I feare ever will be unto the end, that is said in the Glosse, and is in common law, *Laici oppidò semper infesti sunt Clericis*: Lastly, That Clerks suits and quarrels should not be divulged and spread abroad among the Lay people, and that many times, to the great discredit of the whole profession, specially in criminall matters, wherein Princes anciently so much tendered the Clergie, that if any man among them had committed any thing worthy death, or open shame, he was not first executed, or put to his publick disgrace, before he was degraded by the Bishop, and his Clergie, and so was executed and put to shame, not as a Clerk, but as a Lay malefactor; which regard towards Ecclesiasticall men, it were well it were still retained, both because the consideration thereof is reverent, and worthy the dignity of the Ministerie, whose office is most honourable, and also for that it is more ancient than any Papistickall immunitie is.

*Hofiensis in
summa de offi-
cio Vicarii nu-
mero 2. in fine,
nominationem
ab Episc. pote-
statem verò à
jure recipiunt.*

S E C T. 3.

The third and last Reason.

THe third reason that moves me that I should beleieve, that these Titles sometimes were here in exercise among us in the Ecclesiasticall Courts, is, that I find *Glanvill*, who himselfe lived under *Henry* the second, and was Lord chiefe Justice of England in his dayes sort to the Ecclesiasticall Courts, the plea of Tenements, where the suit is betweene two Clerkes, or betweene a Clerke or a Lay-man, and the plea is, *De libera eleemosina feodi Ecclesiastici, & non petitur inde recognitio*, whether the frank fee be Lay or Ecclesiasticall: where also is farther added, that if it be found by the verdict of legall and sufficient men, that it is of Ecclesiasticall fee, it shall not be after drawne to Lay fee, no though it be held of the Church, by services thereunto due and accustomed: secondly, whereas land is demaunded in marriage by the husband, or the wife, or their heire, and the demaund be against the giver, or his heire, then it shall be at the choice of the demander, whether he will sue for the same in the Court Christian, or in the secular Court: For faith he, it pertaineth to the Ecclesiasticall Courts to hold plea of Dowries, which he calleth *Maritagia*, if so be the plaintife so make choice of those Courts, for the mutuall affiance that is there made betweene the man, and the wife, for marriage to be had between them, and there is a Dowry promised unto the man by the womans friends, neither shall this plea bee carried unto the temporall Courts, no though the lands be of Lay fee, so that it be certaine the suit is for a Dowry, but if the suit be against a stranger, it is otherwise: Again, the Kings prohibition forbidding the Clergie the dealing in many things which are of Lay fee, forbids them no one thing that is of Ecclesiasticall fee, and to shew the Princes meaning precisely therein, that it was not his intent by that Prohibition to restraine the Ecclesiasticall Judges for proceeding in matters of Ecclesiasticall fee, hee sets downe

in

*Glanvill lib. 12.
cap. 25. de Legi-
bus Anglia.*

*Idem lib. 13.
cap. 25.*

*Idem lib. 7. cap.
18.*

Anno 24. Ed. 1.

in very tearmes these words (Recognisances touching Lay fee) as though he would hereby signifie to all men, that he would not touch matters of Ecclesiasticall fee, which did then wholly and properly appertain to the tryall of the Christian Court, as hath been before vouched out of *Glanvill*; who for the place he then held, may be thought to have knowne the Lawes of England, as then they stood, and the right interpretation thereof, as well as any man then, or now living. And yet because there were some things of Lay fee, which the Clergie then had cognisance of, and as yet have in some measure; as causes, and matters of mony, chattels, and debts, rising out of Testaments, or Matrimonie, because hee would have whatsoever belonged to the Clergy to be undoubted, excepteth them from those things which belong to the Crown and dignity, and leaveth them to the ordering of the Christian Courts; which is nothing else but an affirmance of that which *Glanvill* and the rest of the ancient English Lawyers, *Bracton* and *Britton* said before.

Adde hereunto the provincially Constitution *Aeterna de pœnis*, made in the dayes of *Henry* the third, which plainly shewes, that in those dayes all personall suits betweene either Clerk & Clerk, or between Lay men complaynants, & Clerkes defendants (for ever the Plaintife must follow the Court of the Defendant, which to the Ecclesiasticall men then was the Ecclesiasticall Court) were tryed by the Spirituall Law, & not by the Temporall Law; which practise for that it doth accord with the Judgement of those ancient Lawyers that have beene before cited, and with the Prohibition it selfe, which there restraineth onely calling of Lay men to make recognisances of matters of Lay fee; it may be a great argument, that these things were of the Ecclesiasticall right in those dayes: from which I see not how the Ecclesiasticall Courts are false, for I see neither Law, nor Statute to the contrary, unlesse perhaps they will say the Statute of the 25. of *Henry* 8. cap. 19. took the same away, ^{25. H. 8. cap. 19.} as being hurtfull to the Kings Prerogative royall, and repugnant

pugnant to the Lawes, Statutes, & Customes of this Realme; which whether they be, or be not taken away by the stroak of that Statute, I leave it to men of better experience in these matters than my selfe to judge.

But yet this I finde by experience to be true, that where there are two divers jurisdictions in one Common-wealth, unlesse they be carefully bounded by the Prince, & an equall respect carried to both of them, so farre as their places, and the necessary use of them in the Common-wealth requires, as the advancement of the one increaseth, so the practise of the other decreaseth, specially if one have got the countenance of the State more than the other: which is the onely cause at this day of the overflowing of the one, and the ebbing of the other, but it is in his sacred Majestie to redresse it, not by taking any thing from that profession that is theirs, but restoring to this profession, that which is their owne: but hereof *οὐδ' δεῖ.*

S E C T. 5.

That some Titles of the Canon Law are granted to bee of absolute use with us, and that of some other there is question made.

FOR the rest of the matters that belong to the tryall of the Ecclesiasticall Courts, some are acknowledged to be absolutely in use, some others are challenged to be but in a certaine measure in use.

In absolute use are those which never had any opposition against them, which almost are those alone which belong to the Bishops degree or order; for all things which come within the compasse of the Ecclesiasticall Law, are either belonging to the Bishops degree, or his jurisdiction: To his degree and order belong the ordering of Ministers & Deacons, the confirmation of Children, the dedication of Churches and Churchyards, and such like, none of which have beene challenged at any time to belong to any other Law. The second sort is of them that belong to the Bishops

shops jurisdiction, which is partly voluntary, partly litigious: Voluntarie is, when those with whom the dealing is, stand not against it; but litigious it is, when it is oppugned by the one Part or the other; of this latter sort many things in sundry ages have beene called in question, but yet rescued and recovered againe by the wise and grave Judges themselves who have found the challenge of them to be uniuersall. But what doth belong to either of them in private, or what causes do appertaine to the whole Iurisdiction in generall, because they have beene already Particularly set downe by that famous man of worthy memory *Doctor Cosin*, in his learned Apologie for certaine proceedings in Ecclesiasticall Courts; I will not make a new catalogue of them, but send the Reader for the knowledge thereof unto his Booke; but yet in my passage will I note, which of them have beene most chiefly oppugned, & as occasion shall fall out, speake of them.

Cosin in his Apologie page 1. c. 2.



PART III.

CHAP. I.

SECT. I.

How the Jurisdiction which is of Civile and Ecclesiasticall cognisance, is impeached by the Common Law of this Land: and first of the impeachment thereof by the Statute of Præmunire facias.

ANd thus much as concerning those parts of the Ecclesiasticall Law, which are here in use with us: Now it followeth, to shew wherby the exercise of that Iurisdiction which is granted to bee of the Civile and Ecclesiasticall cognisance, is defeated & impeached by the Common Law of this Land, which is the third part of this Division.

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The

The impeachment therefore is by one of these meanes, by *Pramunire*, by *Prohibition*, by *Injunction*, by *Supersedeas*, by *Indicavit*, or *Quare impedit*: but because the foure last are nothing so frequent, nor so harmfull as the others, and that this Booke would grow into a huge volume, if I should prosecute them all, I will onely treat of the two first, and put over the rest unto some better oportunitie.

What is a
Pramunire,

A *Pramunire* therfore is a writ awarded out of the Kings Bench, against one who hath procured out any Bull, or like proces of the Pope from *Rome*, or else where, for any Ecclesiasticall place, or preferment within this Realme; or doth sue in any forreine Ecclesiasticall Court, to defeate or impeach any Iudgement given in the Kings Court, wherby the body of the offender is to bee imprisoned during the Kings pleasure, his goods forfeited, and his lands seized into the Kings hand, so long as the offender liveth.

25. Ed. 2.

27. Ed. 3. c. 1.

38 Ed. 3 c. 1.

c. 2.

7. Rich. 2. c. 12.

13 Rich. 2. c. 2.

2. H. 4 cap. 3.

*Neverthe-
lesse even out

This writ was much in use, during the time the Bishop of *Rome's* authoritie was in credit in this land, and very necessarie it was it should be so, for being then two like principall authorities acknowledged within this Land, the Spirituall in the Pope, and the Temporall in the King; the Spirituall grew on so fast on the Temporall, that it was to be feared (had not* these Statutes beene provided to restraine the Popes enterprises) the spirituall Iurisdiction had devoured up the temporall, as the temporall now on the contrary side hath almost swallowed up the spirituall. But since the forreine authoritie in spirituall matters is abolished, & of these Statutes, have our Professours of the Common Law wrought many dangers to the Jurisdiction Ecclesiasticall, threatening the punishment contained in the Statute Ann. 27. Edm. 3. & 38. ejusdem, almost to every thing that the Court Christian dealeth in pretending all things dealt with in those Courts, to be the disherison of the Crowne (from the which, and none other fountaine, all Ecclesiasticall Jurisdiction is now derived) whereas in truth Sir Thomas Smith saith very rightly and charitably, that the uniting of the Supremacie Ecclesiasticall and Temporall in the King, utterly voideth the use of all those Statutes: (*Nam cessante ratine, cessat lex*) and whatsoever is now wrought or threatned against the Jurisdiction Ecclesiasticall, is but in emulation of one Court to another, and by consequent, a derogation of that authority, from which all Jurisdiction is now derived, and the maintenance whereof was by those Princes especially purposed. D. Comel in the Interpreter.

either

either Iurisdiction is agnied to be setled wholly, & onely in the Prince of this land, sundry wise mens opinion is, there can lye no *Pramunire* by those Statutes at this day, against any man exercising any subordinate Iurisdiction under the King, whether the same bee in the Kings name, or in his name who hath the same immediatly from the King: for that now all Iurisdiction, whether it be temporall or Ecclesiasticall is the Kings, and such Ecclesiasticall Lawes as now are in force, are called the Kings Ecclesiasticall Lawes, and the Kings Ecclesiasticall Courts; for that the King cannot have in himselfe a contrarietie of Iurisdiction, fighting one against the other, as it was in the case betweene himselfe and the Pope, although hee may have diversitie of Iurisdiction within himselfe, which for order sake, and for avoyding of confusion in government, hee may restraine to certaine severall kinds of causes, and inflict punishment upon those that shall goe beyond the bounds or limits that are prescribed them: but to take them as enemies, or underminers of his state, he cannot; for the question here is not, who is head of the cause, or Iurisdiction in controversie, but who is to hold plea thereof, or exercise the Iurisdiction under that head, the Ecclesiasticall or Temporall Iudge. Neither is that to move any man, that the Statutes made in former times against such Provissors, which vexed the king and people of this land with such unjust suits, doe not only provide against such Proces as came from *Rome*, but against all others that came else-where, being like cōditioned as they: for that it was not the meaning of those Statutes, or any of them, therby to tax the Bishops Courts, or any Consistory within this land; for that none of them ever used such malepert sawcinesse against the King, as to call the Iudgements of his Courts into question, although they went farre in straying upon those things & causes, which were held to be of the Kings temporall cognisance, as may appeare by the Kings Prohibition theron framed. And beside the Archbishops, Bishops, and other prelates of this Land, in the greatest heat of all businesse, being then present in the

Parliament with the rest of the Nobility, disavowed the Popes insolencie toward the King in this behalfe; and assured him they would and ought to stand with his Majestie against the Pope, in these and all other cases touching his Crowne & Regalitie, as they were bound by their allegiance: so that they being not guilty of these enterprises against the King, but in as great a measure troubled in their owne jurisdiction by the Pope, as the King himselfe was in the right of his Crowne, as may appeare out of the course of the said Statutes; The word (*Elsewhere*) can in no right sense be understood of them, or in their Consistories: although some of late time thinking all is good service to the Realme, that is done for the advancement of the Common Law, & depressing of the Civile Law, have so interpreted it, but without ground or warrant of the Statutes themselves, who wholly make provision against forreine authority, and speake no word of domesticall proceedings. But the same word (*Elsewhere*) is to be meant and conceived of the places of remove the Popes used in those dayes, being sometimes at *Rome* in *Italy*, sometimes at *Avignon* in *France*, sometimes in other places, as by the date of the Bulls, and other processe of that age may be seene; which severall removes of his, gave occasion to the Parliament of inserting the word (*Elsewhere*), in the body of those Statutes, that thereby the Statutes providing against Processe dated at *Rome*, they might not bee eluded by like Processe dated at *Avignon*, or any other place of the Popes aboade, and so the penaltie thereof towards the offender might become voyde, and be frustrated. Neither did the Lawes of this Land at any time whiles the Popes authoritie was in his greatest pride within this Realm, ever impute a *Pramunire* to any spirituall Subject, dealing in any Temporall matter, by any ordinary power within the Land, but restrained them by *Prohibition* onely; as it is plaine by the Kings *Prohibition*, wherein are the greatest matters that ever the Clergie attempted by ordinary, and domesticall authority, and yet are refuted onely by *Prohibition*. But

when

Et lestat est (in
Cursa Romana
vel alibi) le quel
(alibi) est à en-
tender en la
Cours. Et si
estut quasi hō
me sousue la
pur chose que
appent al Com-
len ley il aura
Pramunire,
Etz herb. Nat.
Bre. Tst. Pra-
munire facias.

when as certaine busie-headed fellowes were not content to presse upon the Kings Regall jurisdiction at home, but would seeke for meanes, for preferment, for forrain authority, to controule the Iudgments given in the Kings Courts by proceffe from the Pope; thewere *Premunire's* decreed, both to punish those audacious enterprises of those factious Subjects, and also to check the Popes insolencie, that hee should not venter hereafter to enterprise such designments against the King and his people. But now, since the feare thereof is past, by reason all entercourse is taken away betweene the Kings good subjects, and the Court of *Rome*, it is not to bee thought the meaning of good and mercifull Princes of this Land is that the cause of these Statutes being taken away, the effect thereof should remain; & that good and dutifull Subjects stepping happily away in the exercise of some part of their jurisdiction, (but yet without prejudice of the Prince, or his Regall power) shall bee punished with like rigour of Law, as those which were molesters, greevers, and disquieters of the whole estate. But yet notwithstanding the edge of those *Premunire's* which were then framed, remaine sharpe & unblunted still against Priests, Iesuits, and other like Runnagates, which being not content with their owne naturall Princes government, seeke to bring in againe, that and like forraine authoritie, which those Statutes made provision against; but these things I leave to the reverend Iudges of the Land, & others that are skilfull in that profession, onely wishing that some which have most insight into these matters, would adde some light unto them, that men might not stumble at them, and fall into the danger of them unawares: but, now to Prohibitions.

SECT. 2.

The impeachment thereof by Prohibition and what it is.

A Prohibition is a commandement sent out of some of the Kings higher Courts of Records, where Pro-

hibitions have beene used to be granted in the Kings name, sealed with the seale of that Court, & subscribed with the Teste of the chiefe Iudge, or Iustice of the Court, from whence the said Prohibition doth come, at the suggestion of the Plantife, pretending himselfe to be grieved by some Ecclesiasticall or marine Iudge, in not admittance of some matter, or doing some other thing against his right, in his or their judiciall proceedings, commanding the said Ecclesiasticall or marine Iudge to proceed no further in that cause: & if they have sent out any censure Ecclesiasticall or Marine against the Plantife, they recall it, & loose him from the same, under paine of the Kings high indignation, upon pretence that the same cause doth not belong to the Ecclesiasticall or Marine Iudge, but is of the temporall cognisance, and doth appertaine to the Crowne and dignitie.

Of Prohibitions, some are Prohibitions of Law, some other are Prohibitions of Fact.

What are Prohibitions of Law.

Prohibitions of Law, are those which are set downe by any Law or Statute of this Land, whereby Ecclesiasticall Courts are interdicted to deale in the matters therein contained, such as are all those things which are expressed in the Kings Prohibition; as are also those which are mentioned by the second of *Edward* the sixth, where Iudges Ecclesiasticall are forbid to hold plea of any matter contrary to the effect, intent, or meaning of the Statute of *W. 2. Capite 2.* The Statute of *Articuli Cleri, Circumspecte agatis, Sylva Cadua*, the treatise *De Regia Prohibitione*, the Statute *Anno 1. Edwardi 3. Capite 10.* or ought else wherein the Kings Court ought to have Iurisdiction.

What are Prohibitions of fact.

Prohibitions of fact, are such which have no precise word, or letter of Law, or Statute for them, as have the other, but are raised up by argument out of the wit of the Devisor. These, for the most part, are meere quirks and subtilties of law, and therefore ought to have no more favour in any wise, honourable, or well ordered Consistorie, than the equity of the cause it selfe doth deserve; for such manner of shifts (for the most part) breed nought else but matter of vexation,

vexation, and have no other commendable end in them, though they pretend the right of the Kings Court, as those other Prohibitions of the Law doe: but the Kings right is not to be supposed by imagination, but is to be made plaine by demonstration, and so both the Statute of the 18. of *Edward* the third, *capite* 5. is, where it is provided, that no Prohibition shall goe out, but where the King hath the cognisance, and of right ought to have; and also by the forenamed Statute of *Edward* the sixth, which forbids that any Prohibition shall be granted out, but upon sight of the libell, & other warie circumstances in the said Statute expressed: by which it is to be intended the meaning of the Law-givers was not, that every idle suggestion of every Attourney should breed a Prohibition, but such onely should bee granted, as the Iudge in his wisdom should thinke worthy of that favour, and if right and equitie did deserve it: although (as I must needs confesse) the Statute is defective in this behalfe, for to exact any such precise examination of him in these cases, as it is also in other points, and is almost the generall imperfection of all Statutes, that are made upon Ecclesiasticall causes: but I feare mee as emulation betweene the two Lawes, in the beginning brought in these multitudes of Prohibitions, either against or beside law, so the gaine they bring unto the Temporall Courts maintaineth them; which also makes the Iudges they cesse not costs & damages in cases of consultation, (although the Statute precisely requires their assent & assignment therein) because they would not deterre other men from suing out of Prohibitions, and pursuing of the same.

The Prohibitions of the law, as have beene before shewed, are neither many, nor much repined at, because they containe a necessary distinction betweene Iurisdiction and Iurisdiction, and imply the Kings right and Subjects benefit: but the Prohibitions of fact of men, are both infinite and odious, for that there is, well nigh, no matter either Civile or Ecclesiasticall, be it never so cleere or absolute, but they clog and incumber it with some Prohibition; and the

the matter they containe, is (for the most part) absurd and frivolous, as shall first appeare in marine causes, and after in Ecclesiasticall matters.

SECT. 3.

Concerning the common Lawyers action of Trover, and what is meant in the Law by a Fiction, to shew, how the Civile Jurisdiction is impeached in matters of Admiraltie.

FOR Marine causes it is well knowne, that all such bargaines and contracts, or as it were contracts, as are made by any persons either in any forraine countrey, or any haven or creeke of the Sea, or any shore thereof, as farre as the greatest winter wave doth runne out, or upon any great river, to the first bridge next to the Sea, for any merchandize, ship, tackle, or other negotiation belonging to the Sea, or to any merchandize brought from beyond the Sea, is, and ought to be of the admirall cognisance, and so evermore hath beene since the Court of the Admiraltie was first erected: and yet the common Lawyers (to defeat the Civile Law of the triall thereof) have devised sundry actions, & among the rest, an action of Trover, whereby they saine, that a ship arrived in *Cheapside*, or some other like place within the Citie, and there the Plaintife and Defendant meeting together, bargained upon some merchandize, or other like sea-faring matter, by which fiction, they pretend the bargain now is to be tryed in the Common Law, and not by the Civile Law, as being done in the body of a Countie, and not upon the maine Sea, or any other place subject to the Admirall Jurisdiction.

But that this fiction, or any other like qualitie to this, should have any such force, as to worke any effect in Law, I will shew, first the definition of a fiction, then by those things that are necessarily attendant thereon.

A fiction therfore is defined by *Bartol* (whom also the rest of the Doctors doe follow) to be an assumption of the Law upon

*L. si quis pro
emptore § 3. ff.
de usucap.*

upon an untruth, for a truth, in a certaine thing possible to be done, and yet not done: upon which fiction the Doctors hold, there waite two things, the one in Equitie, the other Possibility. For first, unlesse there be cause why, that which is not, should be fained to be, and that which is, should be accounted not to be, and that which is done in one sort, or at one time, or in one place, should be imagined to be done in another sort, at another time, and in another place, there is no reason a fiction should be admitted: for the Law alloweth no man to come to extraordinary remedies, but where ordinary remedies faile: and therefore if that which is in controversie may bee obtained by any other meanes, than by a fiction, a fiction is not to be afforded: but if ordinary means cannot be had, then fictions may be entertained to supply the defect of the ordinary meanes, that thereby, although the truth be otherwise, yet the effect of the Law may be all one.

So then, the Law faineth an infant not yet borne, to bee borne for his benefit, for that happely without that fiction, the poore infant should be remediless of his Filiall Portion, Legacie, or other right in conscience due unto him: so Nephewes and Nieces succeed together with their Uncles and Aunts in their Grandfathers and Grandmothers goods, for such portion as should have come to their parents, if they had lived; for that the Law presumeth them to represent the person of their parents: so he that is dead, is fained to be alive to many constructions in Law, specially if many of his equals in age be alive, at the time that he is fained to be alive: so he that is alive, and is in capacity, (for the upholding of his Will which he made in liberty) is fained to be dead the houre before he became captive: so he that is obstinate and will not appeare in Judgement, being lawfully called thereto, is fained to be present, that neither himself should take benefit out of his obstinacie, neither his adversary hurt by his absence and injurie. Infinite more examples might bee brought of this sort, but it would be too long to run through them all, and this shall suffice to have

*L. Gallus §. si e-
jus ff. de liberis
& posthumis: l.
si pater §. si
cum. ff. de ad. pt.*

*Horat. de Arte
poetica.*

*Bartol l. si in
qui pro empto-
renum. 21. 22.
23. & sequen-
tibus.*

shewed that the Law approveth fictions, but where there is equitie for it, and the Law it selfe otherwise cannot have her effect. And as the Law cannot proceed to a fiction without equity, so neither can it faine any thing that is impossible, for Art evermore followeth Nature; and therefore if a man would faine disproportionable things, such as the Painter did in *Horace*, who made Boares wallow in the waves of the Sea, & Dolphins wander in the woods; these fictions in no sence can be admitted, for that they are such, as neither Nature nor Reason can brooke. In like sort, if a man would faine one to live, who were dead two hundred yeares since, so that it were not possible that hee or any of his equals should live at that age, this would not hold in Law, for that it is above the age that the Law doth presume any man may live by Nature; although the Law doth presume such as dye in war for defence of their countrey (for the better encouragement of those that are alive, to venture themselves in like service for the common-wealth) to live for ever; because their fame doth flourish for ever: and upon like reason the Law will not suffer any person to adopt another for his childe, who is either elder or equall in age unto himselfe, or is not so farre under his yeares, as by course of Nature hee might be his naturall childe indeed: so much the Law detesteth impossibilities, that it will not suffer a man to faine that which in common Sence and Nature might not be true indeed.

Now, if these things be true, as in all reason and shew, by former precedents they appeare to be true, I would gladly see how actions of Trover, (whereby the Common Lawyers translate unto themselves matters of Marine tryall) if they be squared to these Rules of Fictions, can be maintained: for first to speake of equitie, which the Law requires in these manner of proceedings, what equitie can it be to take away the tryall of such businesse as belongeth to one Court, and to pull it to another Court; specially, when as the Court from whence it is drawne, is more fit for it, both in respect of the fulnesse of knowledge that that Court hath

hath to deale in such businesse, and also of the competencie of skill, that is in the Iudges & Professours of those Courts, correspondent to these causes, more than is in the Iudges and Professours of the other Courts, for the deciding and determining of these matters. For, albeit otherwise they are very wise and sufficient men in the understanding of their owne profession, yet have they small skill or knowledge in matters pertaining to the Civile profession: for that there is nothing written in their Bookes of these matters, more than is to be gathered out of a few Statutes of former time, whose drift was not to open any doore unto them, to enter upon the Admirall profession, but to preserve the Kings Iurisdiction from the Admirall incroachment, as may by the said Statutes appeare; whereas contrarily, the Civile Law hath sundry titles included in the body thereof, concerning these kindes of causes; whereupon the Interpreters of the Law have largely commented, and others have made severall Tractates thereof: So that, by all likelihood, these men are more fit and better furnished to deale in this businesse, than any men of any other profession, as having, besides the strength of their owne wit, other mens helpes and labours to relie upon.

Besides, this businesse many times concernes not only our owne countrey-men, but also strangers, who are parties to the suit, who are borne, and doe live in countries ordered by the Civile Law, whereby they may bee presumed to have more skill and better liking of that Law, than they can bee thought to have of our Lawes, and our proceedings: and therefore it were no indifferencie to call them from the tryall of that Law, which they, in some part know, and is the Law of their countrey (as it is almost to all Christendome besides) to the tryall of a Law which they know in no part, and is meere forraine unto them; specially when the Princes of this Land have anciently allowed the Civile Law to be a Common Law, in these causes, as well to their owne subjects, as it is to strangers.

Further, the avocating away of causes in this sort from

one Jurisdiction to another, specially when the cause hath long depended in the Court from whence it is called, inso-much as now it is ready for sentence, or rather is past sentence, and stands at execution, cannot be but great injurie to the subject after so much labour lost, and money spent in waste, to begin this suit anew againe: which is like to *Sisyphus* punishment, who, when he hath with all his might, forced his stone up to the top of the hill, and so is (as himselfe hopes) at the end of his labour; yet the stone rowles downe again on him, and so his second labour (his strength being spent with the toyle of the first) is more grievous than the former was: which being semblably true in a poore Clyent, who hath his cause in hearing, there can be no equity in this fiction, whereby a cause so neare ended, should againe be put upon the Anvill, as though it were still rough worke and new to be begun.

And surely, as there is no equity in it, so there is no possibility such a fiction should be maintained by Law; for that it hath no ground of reason to rest his feet on. For if this be granted, that such a fiction by Law may be made, then one of these absurdities must needs follow, either that a shippe may arive in a place where no water is to carry it, or if that it arive according to the fiction, either the people, their houses & their wealth shall all be overwhelmed in the water, as the world was in *Noahs* Floud, & *Deucalions* Deluge, and so no body there shall be left alive to make any bargain or contract with the Mariners & Shipmen that arive there; or that the people that dwell there shall walk upon the water, as people doe on land, which *Peter* himselfe was not able to doe, but had suncke, if *Christ* had not reacht his hand unto him, and therefore far lesse possible for any other man to doe. So that it may be well said (these things standing as they doe) no such fiction can hold, and that no action can be framed upon it; for as there is no Obligation of impossible things, so there is no Action of things that neither Nature nor Reason will afford to be done: neither is it to the purpose that the maintainers of these fictions doe say, that

that in this case, the place where the contract is made is not considerable, which I take to be farre otherwise; for that, when that themselves will convey a Marine cause from the Sea unto the Land, they will lay it to be done in some speciall place of a Countrie, bee the place never so unproper for such an action: for that the foundation of these actions, is the place where they were done, as namely that they were done in the body of such a Countrey, or such a Countrey, and not upon the maine Sea, or beneath the lowest bridge, that is upon any great river next the Sea. And therfore in two emulous Jurisdictions, when they are so divided, as that one is assigned the sea, the other the land, the place of the action can in no sort be suppressed, and another supplied in the roome thereof: *Quod enim una via prohibetur, alia via non est permittendum, & quod prohibitum est directo prohibetur etiam per obliquum*: for if this were granted, then matter enough would bee offered to one Jurisdiction to devour up the other, and the Law would be easily eluded: which, to restraine either of these Jurisdictions to their owne place, and to provide that one in his greatnesse doe not swell up against the other, hath set either of them their bounds and limits which they shall not passe: which, as it is the good provision of the Law, so ought either Jurisdiction in all obedience to submit it selfe thereunto, for that the diminishing of either of them is a wrong to the Prince from whom they are derived, who is no lesse Lord of the Sea, than he is King of the Land: and therefore, in no sort, such liberty must be allowed to the one directly or indirectly, as that it should be a spoile unto the other; which would easily come to passe, if when as the Law alloweth not any man to sue a Marine matter by the ordinary course of the Lawes of this Land, yet a man will follow it by an extraordinary. But where there is an uniformitie of Jurisdiction, as that it is all by sea and all by land, there may a thing be fained to bee done in one place, that was done in another place, without any mans prejudice, for that in this case the place is not traversable (so it bee not in Criminall matters

where time and place is required, that the accuser doe not wander from place to place with the injurie of the accuser) for howsoever the place and the action is altered, yet the truth and the cause remaineth one and the selfe same still. And so farre as concerning actions of Trover in Admirall causes: Now it doth follow, that I should speake of like prejudices that grow to the same by actions of Trespasse, but those will I passe over, for that in so small a Treatise as this is, I cannot goe over all: and therefore will I onely put the Reader in minde, that there are more devises, rising out of the Common Law than one, that intell the Admiralty. But now to Wils and Testaments wherein they are impeached.

S E C T. 4.

Concerning Wils and Testaments, wherein they are impeached.

FOr matters of Wils and Legacies, they are so proper to the triall of the Ecclesiasticall Law of this Realm that the professors of the Common Law themselves, doe oftentimes confesse and say, they have no more to doe therewith, than the Civilian hath to do with the knowledge of the matters of Franktenement: and yet even these matters of Testaments and Legacies, although Prohibitions be not so frequent in them, as they are in the rest of Ecclesiasticall causes, yet they are not quite voide of them, & that in some points, wherein the very life and essence of a Will doth stand.

For whereas the ancient *Romans*, knowing how subject matters of Wils are to forgerie and corruption on the one side, and suppression and concealment on the other side, to meet with all craft and subtilty whatsoever, which might seize on them, did most carefully provide, that there should be seven witnesses, at the least, present at the making of every Will & testament, except it were in time of some generall plague or sicknes, when so many witnesses could not conveniently be had together, for fear of infection, or that it were

were in the Countrey, where there are small multitude of people. And that those witnesses should be particularly required to that purpose, with diverse other observations and circumstances tending all to the safe and sure making thereof; which the Ecclesiasticall Law altered afterward in sundry points, for that many true Wills were many times overthrowne for want of those precise solemnities. It therefore reduced the whole number of those seven witnesses, unto two onely, agreeably to the Law of God, and the Law of Nations, where that number of witnesses is allowed, as competent to prove any matter, so that the same witnesses bee honest and credible persons, such whose faith is not doubted of. The Common Lawyers, because themselves in sundry matters very dangerously many times admit one witnesse, and give him full credit, and that in matters of great weight and importance, (as though all should bee squared to their rule, and framed to their compasse) if an Ecclesiasticall Iudge in the probate of a Will, contrary to the rules of his owne Law, will not admit the testimony of one witnesse, they forthwith sling out a Prohibition against him, as though he had done an offence against the Crowne and dignitie, in that he doth not allow those number of witnesses in the Probate of a Will, that the Common Lawes of this land allow almost in every matter.

For answer to which, if I should alleage the precise forme of the Ecclesiasticall Law, which to the essence of a Will requireth this number of two witnesses, or else holdeth it not for a Will (but in cases *inter liberos*, & *ad pios usus*, where the onely hand of the Father or Testator without witnesses serveth for a Will, so the same be knowne to be the Testators owne hand, or so proved by comparison) I would thinke to wise men I had said sufficiently; but I will not rest hereupon, but will convince themselves, by themselves: for, doe they, I pray you, in their own proceedings, where a Law or Statute requires more witnesses than one, content themselves with one witnesse alone; yea, doe they not in all cases where a certaine number of witnesses are appointed

pointed to prove a fact by Law or Statute, furnish the cause with so many witnesses as the case desires, or else doe they not account the proceeding void? And will they thinke themselves so precisely bound to the keeping of the letter of the Common Law, and will they not suffer the Civilian in like manner to cleave fast to the observation of the Civile Law, especially when it hath the consent of the Law of God, and the Law of Nations, and is his Majesties Ecclesiasticall Law of this Land, aswell as the other is his Temporal Law of the same?

*L. juria jurandi.
S. Simili modo.
C. de Testibus.*

I confesse it may bee true many times, which one man saith, specially when there concurre therewith many great and violent presumptions, and the party that reporteth it is of good credit; but dangerous it is to open this gap to the malice of men; for even so many things shall bee obtruded to the Iudge for truth, which are starke lyes; and many things shall bee pretended to be gold in shew, which in prooffe and practise will be found to be no other thing, but meere dross. And therefore well decreed the Emperour *Constantine*, that no one mans testimony should bee heard, though he were never so great a man in Court.

But perhaps some man will say, If credit shall not be given oftentimes to one mans testimonie, much wickednesse will passe away unpunished: For reply to which I answer, It is better to let a bad man scape, than to punish a good; & although it be true, if a man may excuse himselfe by deniall, no man will be found guilty; so also it is true on the other side, if it be enough to condemnation to be charged by one man alone, without any other witnesses, no man shall be innocent; and therefore the admittance of one witnesse in causes, and the proceeding thereupon to judgement is very dangerous.

Another like barre to this they lay against Ecclesiasticall proceedings in matters of Testament; whereas an Ecclesiasticall Iudge prooveth a Will, wherein are Mannors, Lands, Tenements, and other like Hereditaments bequeathed, challenging this also to be of the Crowne and dignity,

as though the Ecclesiasticall Iudge thereby took upon him to decree which lands were devilable by Will, and which not, or would by his probate adde a strength unto the Will, to make the devise good or bad, whereas on the contrarie part, the Ecclesiasticall Iudge by this act doth onely testifie, that such a person made such a Will, and that the same was proved before himselfe under his Teste, for his last will & Testament. but for the validity of the Will it selfe, & the Legacies & devises therin, whether they were of lands or tenements, or of goods or chattels, the Probate it selfe worketh nothing, but leaveth that to the Law, Common or Ecclesiasticall, according as the bequest belongeth to either of them, whether it be good and vailable in Law, or noe: for it often times falleth out, notwithstanding the Will be lawfully proved before the Ordinary, yet the bequests are not good, either in respect of the person to whom the bequests are made, or in respect of the thing that is not devisable in all, or in part; as by the Common Law, lands in *Capite* cannot be devised, more then for two parts, but in *Socage* the devise is good for all; and by the Custome of the Citie of *London*, and some other places of the Land, a man can bequeath no more than his deaths part, and if hee doe, his bequest is void for the rest; but in other places of the land a man may bequeath all. By the Civile Law a man can bequeath nothing to a Traytor, or an Heretick, or an unlawfull Colledge, or Company (unlesse perhaps it be for the aliment, or maintenance of them in extreame poverty, that they die not for hunger, which is the worke of charitie) and if he doe, the legacie thereof is void to all intents and purposes. So then, the Probate of the Ordinarie in matters of land, neither helpeth, nor hindereth the right of the devise it selfe, but is a declaration onely of the dead mans doome uttered before such & such witnesses: which taketh his strength not so much from the Probate, as from the Law, & is testified onely by the Probate, that the same was declared by the Testator, in the presence of the witnesses therein named, to be his true and last Will. So that no

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man herein is to be offended with the Ordinary, as presuming of a matter not appertaining unto him, (for his testification in all Law and conscience doth belong unto him, to give allowance so farre unto the defuncts Will, as it is avouched before him to be his last act and deed in that behalfe) but rather they are in this case to thanke the Ordinary, that he by that act of his hath preserved the memorie of that, which otherwise perhaps would have beene lost and perished, to the great hurt of the Common-wealth, and others which have private interest therein.

CHAP. II.

SECT. I.

Of the Care that Princes of this Realm have had for the due payment of Tythes unto the Church, and the preserving of the cognisance thereof unto the Ecclesiasticall Courts of this Land, both before the Conquest and since.

F all matters that appertaine to the Ecclesiasticall Courts, there is not one thing that the Princes of this Land have made more carefull provision for, since there was any Church government in this Land, than that all manner of Tythes due by the word of God should be fully and truely paid unto their Parish Churches where they grew; and if they were denied, should be recovered by the Law of the Church. For first before the Conquest, King *Aethelstane* made a Law, that every man should pay his Tythes to God, in manner as *Jacob* did who made a vow to God, If God would bring him back againe to his Countrie, he would when hee returned home, pay Tythes to God, of all that God should give him: the like did King *Edgar*, and King *Edmund*, commanding that those which wilfully refused to pay their Tythes, should bee excommunicated.

Williams

William the Conquerour (as Roger Hovenden reporteth) in the 4. yeare after his conquest, having gotten some time of rest from warre, & settling of rebellious spirits, who kicked at his government at home, entred into a consideration of the well ordering of the Church and Common-wealth, by wholsome Lawes: and therefore by the advise of his Counsell, he summoned all the great Prelates & Potentates of this land, with twelve other sufficient men of every Shire, experienced in the Lawes and customes of the Land, that he might by them learne, by what Lawes & customes the Land was governed, before himself came to the Crown thereof; straitly charging and commanding them upon his high displeasure, they should make true report to him thereof, without adding any thing thereto, or taking any thing therefro: who begining with the Lawes of holy Church, because by it the King and his Throne are established, among other Lawes and liberties of the Church, recorded this for one, which I will *verbatim* set downe in Latin as it is penned by the Authour.

Hovenden p. 17
2 cap De Decimis Ecclesia.

De omni Annona decima garba est Deo reddita, & ideo reddenda: Si quis gregem Equarum habuerit, pullum reddat decimum; qui unam tantum vel duas habuerit, de singulis pullis singulos denarios praebeat. Similiter, qui plures Vaccas habuerit, decimum vitulum, qui unam vel duas, de singulis vitulis singulos denarios; & qui caseum fecerit, det decimum Deo, et si non fecerit, lac decima die. Similiter Agnum decimum, Vellus decimum, Butyrum decimum, Porcellum decimum. De Apibus vero similiter, decimum commodi; quin etiam de bosco, de prato, de aquis, de molendinis, parcis vivariis, piscariis, virgultis, & hortis, & negotiationibus, & omnibus rebus quas dederit Dominus, decima pars ei reddenda est, qui novem partes simul cum decima largitur. Et qui eam detinuerit, per justitiam Episcopi, & Regis (si necesse fuerit) ad solutionem arguatur. Hac enim S. Augustinus predicavit & hac concessa sunt à Rege, Baronibus, & populo. Sed postea instinctu Diaboli multi eam detinuerunt, & Sacerdotes neg-

See for this the lawes of Edward the Confeſſour. num. 8. & 9. by whom this decree was first made, and afterwards ratified by the Conquerour.

ligentes non curabant inire laborem ad perquirendas eas, eò quòd sufficienter habebant vita sua necessaria. Multis enim locis modo sunt tres vel quatuor Ecclesia, ubi tunc temporis una tantum fuit, & sic cœperunt minui.

*Eschelward, lib.
unico.*

*Jocelin of Furness in his Booke
of British Bish-
ops.*

*Marianus
scotus, c.*

This *Augustine*, to whom the *Conquerour* here referreth himselfe, was *Augustine* the Monke, whom *Gregorie* the great about the yeare of our Lord God 569. sent here into *England*, to reëstablish the Faith decayed by the *Saxons*; who set downe sundry ordinances for the Church, and framed it in uniformity of Prayer and government to that, which then was used in the Church of *Rome*; but long before *Aug.* time, as it may by our Stories appeare, (even in the dayes of King *Lucius*, who sent to *Elutherius* a Bishop of *Rome*, for learned men to instruct him and his people in the Faith, which was about a hundred and forty yeares after the Ascension of our Lord Jesus Christ) the Faith of Christ was here preached in *Britaine*, and fiteene Archbishops are by Stories reported, one to have succeeded another in the See of *London*, before the irruption of the *Saxons* into this Land: All which time it is not like the Churches of God that were in the Land, were void of this provision for the Ministerie, so that I assure my selfe the payment of Tythes was farre more ancient than the time of *Augustine*; albeit the *Conquerour* citeth there the authoritie of *Austin*, rather then the former precedent of the *Britons*, both for that the doctrine of *Austin*, rather then any former precedent of the *Britons*, both for that the doctrine of *Austin* was better knowne unto the *Saxons*, among whose Ancestours *Austin* taught and governed as an Archbishop, than any of the Fathers of the *Brittish* Church, to whom the *Saxons* were enemies, and their tongue altogether unknowne unto them; and beside, for that this doctrine of *Austin*, concerning Tythes, best suited with the generall custome that was then used throughout all Europe in paying thereof.

The next Prince after *William* the *Conquerour* that ordered

dered any thing about payment of Tythes, for ought that I have read to the Contrary was *Ed. 1.* who at the petition of the Clergy, established the articles of the Clergy, which his Sonne *Edm. 2.* confirmed by his Letters Patents under his great Seale, and by consent of Parliament, at the petition of the Clergie in the 1x. yeare of his Reigne.

In *Edward* the thirds time, Writs of *Scire facias* were granted out of the Chancerie, to warne Prelats and other Clerks, to answer for Dismes there; but after the matter was well understood by the King, the parties were dismissed from the Secular Judges, for such manner of pleas, saving to the King his right, and such as his Ancestours had, and were wont to have of Reason. *An. 18. Ed. 3. cap. 14.*

During the Reigne of *Richard* the second, Parsons of holy Church were drawne into secular Courts for their owne Tythes, by the name of goods taken away; And it was decreed by the King, that in such case the generall averment of the plaintife should not be taken, without shewing specially how the same was Lay-cattell. *An. 1. Rich. 2. cap. 14.*

By the Statute of the first of the same King *cap. 13.* it is acknowledged, that the pursuing for Tythes of right doth, and of old times was wont to pertaine to the Spirituall Court, and that the Iudges of holy Church onely have the cognisance in these matters. *15. Ed. 3.*

By the Statute of the 15. of *Edm.* the third, it is ordered, That Ministers of the holy Church, neither for money takē for the redemption of corporall penance, nor for prooffe and account of Testaments, nor for travell taken about the same, nor for solemnitie of Marriage, nor for any other thing touching the Iurisdiction of holy Church should be appeached, or arrested, or driven to answer the Kings Iustices, or other Ministers, and thereupon they should have writs in the Chancerie, to the Iustices when they demanded them. *2. Henr. 4.*

In the second yeare of *Henry* the fourth, the Religious of the order of the *Cystercians*, that had purchased Bulls from the Pope to be discharged of the payment of Tythes,

5. H. 4. c. 11.

were by act of Parliament reduced to that state that they were in before.

In the 5. yeare of the same King it was ordered, That all Farmers, and Occupiers of any lands or possessions belonging to any Fryers Aliens, should pay all manner of Tythes due to Parsons and Vicars of holy Church, in whose Parishes the same were, as the Law of holy Church required, notwithstanding the same were seised into the Kings hand, or any Prohibition were made, or to be made to the contrary.

About the 7. yeare of the same King, such religious persons as had purchased Bulls from the Pope in the dayes of *Richard* the second, to be discharged of Dismes pertaining to Parish Churches, Prebends, Hospitals, or Vicarages, not put in execution, were forbid from that time forward, to put them in execution, or to purchase any other in time to come.

27. Hen. 8. c. 20.

After King *Henry* the eighth had dissolved the Monasteries, and other like religious houses, and sold the Churches and Tythes thereto belonging to Lay men, (who before that time were not capable of the same; insomuch as after the dissolution, when the Purchasers demanded the same, they were denied to hold plea thereof, by reason of their incapacitie) a Statute was made in the 27. of the same King, whereby all Subjects of the Kings Dominions, were to pay their Tythes, and other dueties of holy Church according to the Ecclesiasticall Lawes and ordinances of the Church of *England*, and after the laudable uses & customes of the Parishes and places where they dwelt, or occupied lands, and the same to be sued for before the Ordinarie, or some other competent Judge of the place, according to the course and proceffe of the Kings Ecclesiasticall Courts of *England*: which Statute because it tooke little effect, by reason of the obstinacie of the people in not yeelding the duties to the Laitie, who had purchased them, and that the said Purchasers could neither by the order or course of the Ecclesiasticall Lawes, sue for them in any Ecclesiasticall

Ecclesiasticall Court of this Land, neither was there found any remedy in the Common Law of this Land, whereby they might bereleeved against them that wrongfully detained the same. Therefore in the 32. following an other Statute was made, wherein it was enacted, that all and singular persons of this Realme, and other of the Kings Dominions, of what state, degree, or condition soever they were, should fully, truly, and effectually divide, set out, yeeld, and pay all and singular Tythes and Offerings to the owners, proprietaries and possessors of Parsonages, Vicarages, and other Ecclesiasticall places according to the lawfull customes and usages of the Parish & places, where such Tythes or other duties rise and grow due. And in case where any are wronged and greeved, being either an Ecclesiasticall or Lay person, for the wrongfull deteining or with-holding of the said Tythes or offerings, or any part or parcell thereof, the same to have full power and authoritie to convent the same person or persons so deteining the same, before the Ordinarie or other competent Iudge of the place, where such wrong was done: and the same Ordinarie or competent Iudge to have power by vertue of the said Act, to heare, decide, and determine the same by definitive sentence, according to the course and proceeding of the Ecclesiasticall Law, without reservation of any right to the temporall Iudge to give remedie by any suit or action for the recovery of the same; saving in case where an inheritance or freehold in the premises is claimed, and the person claiming is disseised, deforced, and put from the possession of the same, in which cases onely, the Statute alloweth the Temporall Iudge to take knowledge, and that onely for regaining of the right and the possession of the inheritance so lost.

After the decease of King *Henry*, King *Edward* his Sonne tending in like sort the state of the Clergie, the benefit of his Subjects, and the practise of the Ecclesiasticall Courts of this Land, made a Statute, whereby he did not only ratifie, confirme, and allow such Statutes as his Father had formerly

ly made, but did further order, that every of the Kings subjects from thenceforth should justly and truly without fraud or deceit, set out and pay all manner of prediall tythes in their proper kinde, as they did rise and happen in such manner as had beene paid within the fortie yeares next before the making of that act, or of right or custome ought to have beene paid, with certaine forfeitures and penalties, as well against them which carried away any prediall Tythes, before the tenth part thereof were justly divided from the same, or otherwise agreed for with the owner thereof; as also against those that did let or hinder the owner thereof, his deputie or servant, to view, take, or carrie away the same. Enacting further, that the partie so subtracting or withdrawing any of the Tythes, obventions, profits, commodities, or other dueties aforesaid, might or should be convented or sued in the Kings Ecclesiasticall Court, by the party complainant, to the intent the Kings Ecclesiasticall Iudge might then and there determine the same, according to the Kings Ecclesiasticall Lawes. And that it should not be lawfull for the Parson, Vicar, or any other owner or farmer thereof, contrary to the same act, to convent, or sue any with-holder of Tythes, or any other like dueties, before any other Iudge then Ecclesiasticall, excepting onely out of the said Statute things contrary or repugnant to, or against the effect and meaning of the Statute of *Westminster*, the second, the fifth Chapter, the Statutes of *Articuli Cleri*, *Circumspectè agatis*, *Sylva Cadua*, the treaties *De Regia Prohibitione*, matters against the Statute of *Anno primo Edwardi primi*, *Capite decimo*, and such other matters beside, wherein the Kings Court of right ought to have Iurisdiction.

S E C T. 3.

That the Statutes of the xxvii. and xxxii. of Henr. the 8. and the 2. of Edward the vi. cap. 13. intended for the true payment of Tythe, and the preservation of the triall thereof unto the Ecclesiasticall Courts, are now turned to the hinderance of them both.

Notwithstanding all which good provision of ancient Kings before the Conquest, and moderne Kings since the Conquest for the assuring of the suit of Tythes to the Ecclesiasticall Courts onely, and the continuall possession that the Ecclesiasticall Courts have had of the same, deduced from so ancient time, as hath beene before shewed, and so often obtained in contradictorie judgement, as the consultations thereupon granted doe testifie: yet sundry men of this Land, in sundry ages, have by wrenches and subtile devises (which are odious in Law, and are by all godly and wise Judges by all possible meanes evermore to be restrained) raised up matter out of the said Statutes themselves, contrary to the true sence and meaning thereof, to draw the triall of most of those matters away from the Ecclesiasticall Courts. So that those Statutes which then were intended for the good of the Ecclesiasticall Courts, are now become the utter ruine and overthrow of the same, contrary to the rule of the Law, and common reason, that things which were purposed for one end, should worke unto another.

The first advantage they take against the Ecclesiasticall Courts out of these Statutes, is gathered out of the twenty seventh, and thirty second of *Henry 8.* where it is ordered, that all the Kings Subjects shall pay their Tythes, according to the laudable uses and customes of their Parishes, and places where such Tythes grow & become due: which, albeit is undoubtedly meant of Ecclesiasticall customes, triable at the Ecclesiasticall Law, and so ever held till now of late, that men thinke all too much that goeth beside their owne net; yet there want not in these dayes, which goe

L. legata inutiliter. ff. de adi-mendis legatis. l. 2. arte finem. C. de iur. iur. propter calum-niam dando.

27. & 32. H. 8.

about with all might and maine to draw away these things unto the Temporall Courts, as belonging to the Temporall Crowne and dignity: Wherein they doe wrong, not onely to the Kings Ecclesiasticall Courts, to spoyle them of their ancient Jurisdiction, but also doe injurie to the King himselfe, as though hee had but one proper Jurisdiction belonging to his Throne, and seat of Majestie, and that which were done by his Ecclesiasticall power, were done against his Crowne and Dignitie; whereas they are equally united in him, and his Throne is no lesse stayed up by his Ecclesiasticall power, than it is upholden by his Temporall authoritie. And therefore a meere Paradoxe is that, that they so constantly affirme, That customes in payment of Tythes are matters of Temporall cognisance onely, and not of Spirituall cognition. For, as there be secular customes, such as are the customes of Mannors & Lordships, where the Lord hath his Rent, his heriot, his reliefe and service; and the tenant againe doth his homage and fealtie, according to the nature of his Tenure, which secular customes, the forenamed Statute *De Regia Prohibitione*, forbiddeth Ecclesiasticall Iudges to deale in: So also there are Ecclesiasticall customes, such as is the payment of Tythes, and other Ecclesiasticall duties, to which common Lawyers are not to put their hands, but to abstaine from them, as dedicated to the use and tryall of the spirituall Courts. Otherwise would neither the ancient Authors of the Legatines and Provinciall constitutions of this Land (the eldest of which, are equall with the dayes of *Henry* the third, and the youngest of them endeth in the reigne of *Henry* the fifth) ever have changed so many severall customes of payment of Tithes, as then were within the Land, and instead of them, have brought in one uniforme payment of the same, as is at this day used, save where either the negligence of the Parsons, or the covetousnesse of the Parishioners hath in some point changed the same. Neither would these Statutes of *Henry* the eighth ever have ordered the people should pay their Tythes after the laudable customes and usages of the Parishes

Provincial. c.
quoniam de de-
visione.

rities where they grew, if the usage and custome of the payment it selfe had not beene subject to the Ecclesiasticall cognisance: for in vaine shall a man sue for that, the Law allowes him no course to come by, if it be denied in the speciallest point belonging to that suite: for this is undoubted Law: where ever there is an authority or Iurisdiction granted, there are in like manner granted all those things, without which, that authority or Iurisdiction cannot bee perfected, or performed.

L. Finals ff. de officio ejus cui mandata est jurisdictio. l. 3. ff. de penulegato.

S E C T. 3.

That customes of payment of Tithes are triable onely at the Ecclesiasticall Courts.

ANd therefore it is without question, as Tythes, by the said Statutes, are onely recoverable by the Ecclesiasticall Law, and not else-where; so also the custome whereby they are paid, is only triable at the Ecclesiasticall Law. Otherwise this inconvenience will follow thereupon, which in all other Lawes, beside this of ours, is a great absurditie, that the connexitie of the cause, which the Civilians call *Continentiam causarum*, will be dismembred and disjoyned, which by all good policy, together with all her parts emergent or annexed, out to be handled or discussed, and determined before one and the selfe same Iudge; one, I meane not in number, but one in profession, for otherwise I should by this Assertion, barre Appeales, which is not mine intent.

Barol. l. nulli C. de judicij. Glor. c. significaverunt de judicij.

Which course, if it were held here in *England*, causes should not be drawn peece-meale in such sort as *Medea* tore her brother limme-meale, and one part of it carried to this Court, another to that, like unto the rent lims of the childe that were cast here and there by *Medea*, thereby to hinder her father from pursuing her; but all should be ended in one and the selfe same Court, which would be a great ease to the subject, who now to his intolerable vexation, and excessive charges is compelled to runne from Court to Court, and to

Cicero pro Mena.

gather up as it were, one lim of his cause here, and another there, and yet happily in the end cannot make a whole and perfect body of it.

Beside, it is a mighty disorder in a Common-wealth, thus to jumble one Jurisdiction with another, & the very confusion as well of the one Law as the other; for as Kingdomes are preserved by knowing their bounds, and keeping their limits, so also Jurisdictions are maintained and upheld by containing themselves within the lists or banks of their authoritie.

Further, unles they will grant that there is an Ecclesiasticall Custome, as there is a Secular Custome, and that the one is as well to be tried in the one Court, as the other is in the other, they will make their own Doctrine in the before-rehearsed Prohibition voyde, where they will have it certain, that there is a Secular Custome; & if there be a Secular Custome, then doubtlesse there is also an Ecclesiasticall or Spirituall Custome: for the word Secular, is not put in that place absolutely, but relatively; and the nature of Relatives, is one to put another, and one to remove another: but in the Secular Customes they barre the Civilian, therefore they grant him the spirituall, for of contrary things there are contrary reasons, and contrary effects: and what that which is proposed, doth worke in that which is propounded, the same againe that which is opposed doth worke in that which is opposed: by which Rule, as Temporall Lawyers are to deale in Temporall Customes, and Spirituall men are not to intermeddle therein, so also Ecclesiasticall Lawyers are to deale in Ecclesiasticall causes, and Temporall Lawyers are not to busie themselves thereabout.

And that this was the intent of the King, when hee first received the Church into his protection, with all the privileges thereof, may appeare hereby, that having united both the Jurisdictions in his owne person, he did not jumble them both together, as now they are, but kept them distinct, one from the other; not onely in authorising the Ecclesiasticall

*Glos. in Clem.
unica in verbo
aeternaliter de
summa trinit.
& fide catho-
lica.*

*L. Fin. S. plus
autem de legi-
s. 3. & ibi
Angel.*

fasticall Courts that were before, but also in using the very words and phrases that the Iurisdictionaries Ecclesiasticall did use every where in their writings, even these words whereupon men now take hold to frame Prohibitions, viz. (according to the laudable customes and usages of the parish and places where such Tythes grow) which were the words of *Innocent* the third, in the Decretals upon the title of Tythe, long before their Statutes were made, or any other Statutes concerning the true payment of Tythes; and *Linwood* in the same title of Tythes often useth the very selfe same words and phrases that the other doth: so that if these words made no Prohibition before the Statute (as I thinke, it cannot well be shewed to the contrary) neither ought they to doe it now since the Statute; for that they are spoken still in the Church-businesse, and not in a temporall matter: whose government, although it be under one and the selfe same Prince, that the temporall state is, yet is it distinct from the same; as ever it hath beene since there hath beene any settled forme of Church-government in any common-wealth, as may appeare both by the example of *S. Paul*, which never goeth to any temporall power to punish the incestuous person, although there were sundry lawes then both in Greek and Latin written of these matters, but doth it by the spirituall sword alone: and also by that, that in matters of jarre for worldly causes between brother and brother, he forbids such as were new Christians, to goe to law before Infidels, but adviseth them rather to appoint Iudges among themselves to decide such controversies: which albeit in those dayes was meant as well of Lay Christians, as of the Ministers of the Gospell, for that the number of them then was small, and the causes of suit they had one against another were not many, and might easily be ended by one and the selfe same consistorie; yet when the number of the Christians increased, and the Church got some rest from persecution, the Iurisdiction was againe divided; and as there were secular Courts appointed by Princes, wherein Temporall mens causes & Lay businesses were

1 Cor. 5.

1 Cor. 6.

*C. de Episcopalis
audientia ter-
tia.*

heard, so there were also by the same authority erected Ecclesiasticall Courts and Bishops audiences, wherein either Ecclesiasticall mens causes alone, or such as they had against Lay men, or Lay men against them were treated of, and determined.

So that this was no new devise of *Henry* the eighth, or *Edward* his sonne, that when they took upon them the supremacie over the Church, as they had before over the Common-wealth, they did not mishmash both the States together, and make one confused heape of them both, but left them severed as they found them, onely affording either of them an equall proportion of protection; for that by these two parts, the Kings Monarchie is compleat, and himselfe is the head and chiefe Governour of the whole and entire body of his Realme. For this was exemplaried unto them in all former ages, since the Church and Common-wealth had any loving and kind cohabitation together, as hath beene before remembred. And therefore doe they wrong to the ashes of those Kings deceased, which by subtile sence, and strained interpretations, draw these Lawes which they intended for the benefit of the Church, and Church-government, to the overthrow of the same, as though the Positive Lawes of the Kingdome could not stand, if the Lawes of the Church continued and stood up right.

S E C T. 2.

That the limits and bounds of Parishes are of the Ecclesiasticall cognisance onely.

VPon the same word of the same Statute, (if perhaps at any time there grow any controversie about the limits or bounds of Parishes) they draw the same by like importunitie from the tryall of the Ecclesiasticall Law, unto the Common Law, avouching the same also to be of the Temporall cognisance; and yet *Linwood*, who lived in the dayes of *Henry* the fifth, making a Catalogue of the principall

cipall matters that in his dayes belonged unto the Ecclesi-
 sticall Courts, reckoneth the bounds of Parishes for one.
 And very like it is that it should be so, for that Ecclesiasticall
 men first in this Kingdome, made divisions of Parishes, as
 by our owne Chronicles it appeareth; and the first practice
 thereof within this Realme, came from *Honorius* the fourth
 Archbishop of *Canterbury* after *Augustine*, who himselfe *Registro Eccles.
Xpi, Cant. Stow.*
 died in the year of our Lord God 693. although otherwise
 the thing it selfe be more ancient, and descends from the
 counsell of Saint *Paul*, which he gave to *Titus*, to appoint *Tit. cap. 1. v. 5.*
 Elders in every Citie: But that Cities and Countries again
 are divided into severall Parishes, it was the ordinance of
 Pope *Dionysius*, about the yeare 266. and from him deri-
 ved into this and other Realmes; and the distinction there-
 of was chiefly devised, that it might be knowne of what
 congregation every people were, and that so they might be
 trained up in the Schoole of godlinesse under their owne
 Pastor or Minister. But that now the division of Parishes
 doth serve to other politick uses, it comes not of the first
 institution thereof, which was meere Ecclesiasticall: but it
 groweth out of a second cause, that is, because being so fitly
 and aptly primarily divided by Ecclesiasticall men as they
 are; the Princes therefore did use the opportunity thereof
 for temporall services, subdividing the same againe into
 many Tythings or like smaller divisions, for the more spee-
 dy service of the King, and better ordering of the common-
 wealth. Which our ancient Fathers well knowing, never
 called the same in question, acknowledging therein the good
 they had received from Ecclesiasticall men, by this partiti-
 on of Countries into Parishes: but men of later ages being
 lesse thankfull than they, and loath to seeme beholding to
 Ecclesiasticall Courts for any matter of good order and dis-
 position, have arrogated the same wholly to the Temporall
 Courts; as though the Ecclesiasticall Iudge could not as
 well discerne what two or three honest men depose and say
 as concerning the limits or bounds of a Parish, as twelve
 meane men of the Countie, who are upon like depositions
 to

to give up their verdict. But for the limits of Bishopricks, I acknowledge that they are Temporall, for that they were not primarily designed out by Ecclesiasticall men, and their direction, but were assigned to Provinces or Shires, first described and distinguished by Princes: but for Parishes, neither reason nor antiquity concurs with them, that they should be temporall, or that they should be usurped or challenged to be of the temporall cognisance.

And so much for those Prohibitions, which they commonly frame out of the 27. and 32. of *Henry* the eight, not that there are no more but these, but that having a taste of these, there may be like judgement made of the rest.

S E C T. 5.

That the cause of treble Damgages in the 13. chapter 2. Edward the sixt, is to be sued in the Ecclesiasticall Courts onely.

OUt of the Statute of the 2. of *Edward* the sixt cap. 13. they raise many Prohibitions, the first whereof in order of the Statute, although the last in practise, is the prohibition of treble damgages, upon not dividing and setting out of Tythes, or at the least, for the not compounding for them before they be carried away: Which forfeiture they suggest, and thereupon bring a Prohibition, and so draw the whole suit of Tythes into their Courts, contrary to the true meaning of this Statute, which would have those treble damages, in case of not justly dividing and setting out, or not compounding for the Tythes before they be carried away, be no lesse recoverable before an Ecclesiasticall Judge according to the Kings Ecclesiasticall Law, than the forfeiture of double value (by the letting and stopping of them to be carried away, whereby they are lost, with the costs thereon growing) is remediable at the same Law: For albeit the clause which is to redresse this wrong, be put after that part of the Statute, which concernes the stopping and letting of Tythes to be carried away, yet when there is as great reason
that

that it should stretch it self to the first branch of the provision, as to the second, and the second branch hangeth on the first by a conjunction copulative, & there is no heterogeny or disparitie in the matter, whereby it may not be as well verified in the one branch, as in the other, I see no reason why it should not equally respect them both, according to the rule of the Law; *Clausula in fine posita refertur ad omnia precedentia, maximè quando non resultaret intellectus contrarius juri*, as here it doth not: for the intendment of either branch of the Statute is, to procure by their severall forfeitures, a just and true payment of Tythes, the recovery whereof, as the precise words of the Statute in one member restraine unto the Ecclesiasticall Law; so the Identitie of reason in the other member doth confirme it unto the same Law, for where there is the like reason or equitie, there ought to be the like disposition or order of Law. *C. 6. tit. 28. l. 1. L. Illud ff. ad l. Aquilam.*

Beside if the principall cause it selfe be triable in the Ecclesiasticall Court, why should not those things which hang thereon be tryed in the same Court, for they are but as it were accessories to the principall, and so not onely follow the nature of the principall, but also belong to the Court of the principall, and are determinable where the principall is, for otherwise happily there might fall out contrary sentences of one & the selfe same thing, the one condemning, the other absolving.

Further, in that Court wherein the course of Iustice already is begun, the cause may with lesse labour and easier expences be ended, being for the most part determinable by one sentence, than that a new processe thereof should begin before another Iudge, who knoweth little or nothing of the principall matter, and therefore cannot so easily decide the accessorie.

Lastly, those which take this course, first to surmise a forfeiture, then to draw the originall suit, whereupon the forfeiture grew into question, bring in a proceeding farre different from the common stile of all well ordered Courts, in

all Nations, among whom the consufance of the cause, and tryall thereof goeth before, and the forfeiture or execution therof followeth after: But in this *Hysteron proteron*, the execution is in the forward, and the tryall is in the rereward: In which doing they deale much like as *Cacus* the Gyant dealed with *Hercules* Oxen, who, to the intent that *Hercules* should not finde what way they were gon, drew them backward by the tayle into the Cave; but as that device served not *Cacus*, but that *Hercules* had his Oxen againe, so it is to bee hoped the Reverend Iudges of the Land, will not long suffer this subtiltie to prevaile, but as it came in like a Foxe, and reigned like a Wolfe, so in the end it shall dye and vanish away like a vaine device, much like the destinie of *Boniface* the eighth: for the Reverend Iudges are not onely to minister justice between man and man, so that every man may have his owne, and none bee oppressed by another, but also they are to carry an upright and indifferent hand betweene jurisdiction & jurisdiction; yea though themselves be parties to the matter in question, so that one jurisdiction eate not up another, as the Locusts in *Egypte* devoured up all the greene things in the land.

S E C T. 6.

That the naming of Law or Statute in a Statute, doth not make it to be of the Temporall cognisance, if the matter thereof be Ecclesiasticall.

ANother rendevous they make of the wordes of this Proviso. (law, statute, priviledge, prescription, or composition reall) as though all which passeth under any of these tearms must belong to the triall of the Common Law, and not to the cognisance of the Ecclesiasticall Law, and that forsooth, because these words and tearms are expressed in the Statute: which is much like unto that, as one would needes have a house, to be Master Peacocks house, because hee saw a Peacock sit upon the top thereof: But it is not the naming of a thing in a Law or Statute, that makes it to be

be of the Temporall cognisance, or otherwise: but it is the nature or qualitie of the thing named, that rangeth it under the one Law, or the other. So that if the matter ordered in the Law or Statute be Temporall, the cognisance shall bee Temporall; if Spirituall, then the case is determinable in the Ecclesiasticall Law: for this Proviso is not prohibitive, as the last Proviso of this Statute is, whereby Ecclesiasticall Iudges are forbidden to hold plea of any thing that is in the said Proviso conteined; but it is rather directive, and sheweth where the Ecclesiasticall Iudge is to give way to immunities, and to pronounce for them: so that for any thing is conteined in this Proviso to the contrary, the cognisance of these matters, especially, Priviledge, Prescription, and Composition, still remaineth at the tryall of the Ecclesiasticall Law, as they did before this Proviso was made for Tythes, and other Ecclesiasticall duties, as may appeare by the severall titles in the same Law hereon written.

De praescript.
lib. 2. tit. 26.
De Privileg.
lib. 5. tit. 33.

And for the other words, [Law and Statute] therein mentioned: (when as the King hath two Capacities of government in him, the one Spirituall, the other Temporall, and his high Court of Parliament, wherein Lawes are made, doth stand as well of Spirituall men, as Temporall men, and so ought to stand in both houses, if the ancient Booke *De modo tenendi Parliamenti* be true and authenticall, which makes the upper House of three States, the Kings Majestie, the Lords Spirituall, and the Lords Temporall; and the lower House in like sort of three other, the Knights, the Procurators for the Clergie, and the Burgeses; and his Majestie hath within this Realme aswell Ecclesiasticall Lawyers, as Temporall, (which are no lesse able to judge and determine of Ecclesiasticall matters, then the Temporall Lawyers of temporall businesse.) It is not to be imagined, but as his sacred Majestie will have those lawes to be held Temporall, and to have their constructions from Temporall Lawyers, which are made and promulged upon Temporall rights and causes: So also his Highnesse pleasure is, and ever hath beene of all his predeceffours, Kings

and Queenes of this Land, that such Lawes and Statutes as are set out and published upon Ecclesiasticall things and matters, shall be taken and accounted Ecclesiasticall, and interpreted by Ecclesiasticall Lawyers, although either of them have interchangeably each others voyce in them, to make them a Law.

And that the King doth infuse life into either of the Lawes, when as yet their substance is unperfect, and they are as it were Embryons, is in temporall matters, by his temporall authoritie, and in spirituall matters, by his spirituall authoritie, for to that end he hath his double dignitie in that place, as also the Ecclesiasticall Prelates sustaine two persons in that place, the one as they are Barons, the other as they are Bishops: So that even the orders of the House doe evince, that there are two sorts of Lawes in that place unconfounded both in the head and the body, although for communion sake, and to adde more strength to each of them, the generall allowance passeth over them all. And as they rest unconfounded in the creation of them, so ought they to be likewise in the execution of them: & as the Temporall Law sorts to the Temporall Lawyers, so the Spirituall Lawes or Statutes should be allowed and allotted unto the Spirituall Lawyers.

And as the nomination of these words Law or Statute in this precedent Proviso, makes not the Law or Statute Temporall, but that it may remain wholly Ecclesiasticall, by reason of the Spirituall matters it doth containe, & the power of him that quickneth it, & powreth life thereinto: so much lesse can the inserting of these tearmes, Priviledges, Prescriptions, or Compositions reall, intitle the Common Law to the right thereof, or the Professours of the said Law, to the interpretation thereof, for that matters of these titles so farre as they concerne Tythes, and other Ecclesiasticall duties, have beene evermore since there hath beene any Ecclesiasticall Law in this Land (which hath beene neere as long as there hath beene any profession of Christianitie with us) of Ecclesiasticall ordinance, neither ever were
of

of the Temporall cognisance, untill now of late, that they transubstantiate every thing into their owne profession; as *Midas* turned or transubstantiated every thing that hee touched into gold.

CHAP. III.

SECT. I.

How it comes to passe, that when Tythes were never clogged with custome, prescription, or composition under the Law, they are clogged with the same under the Gospell, and the causes thereof.

BUt here it will not be amisse to enquire, (since Tythes came in the beginning of the Primitive Church, within a little time after the destruction of *Ierusalem*, and the subversion of the Jewes policie, unto the Christian Church and Common-wealth, voide of all these incumbrances, as shall appeare after by the testimonie of sundry of the ancient Fathers, which were neere the Apostles time) how it comes to passe (since Tythes are no lesse the Lords portion now, than they were then, and in the Patriarchs time before them) that these greivances have come upon them more under the Gospell, than ever they did under the Law: for then never any Lay man durst stretch out his hand unto them, to diminish any part thereof, but hee was charged with robbrie by the Lords owne mouth; and in punishment thereof, the heavens were shut up for giving raine unto the earth; and the Palmer-worme and Grashopper were sent to devoure all the greene things upon the earth. And for Ecclesiasticall men, it is not read any where in the Scripture, that ever they attempted to grant out any privilege of Tythes to any person, other than to whom they were disposed by the Law, or to make any composition thereof betweene the Lay Jew, and the Lords Levites: every of the which have beene, not onely attempted against

Malach. 3.

the Church in Christianitie, but executed with great greedinesse: so farre worse hath beene the state of the Ministry under the Gospel, than was the condition of the Priests and Levites under the Law.

S E C T. 3.

That the causes are two-fold: First, The violent intrusion of Lay-men; and secondly, The over-much curiositie of Schoole-men; and first of the first cause, and therein concerning Charles Martels Infendations, and the violent prescriptions ensuing thereupon.

THe beginning whereof, although it be hard for me to finde out, because there is small memory thereof left in Stories; yet as farre as I can by all probabilities conjecture, this great alteration in Ecclesiasticall matters, came by two occasions: the one by the violence of the Laitie, thrusting themselves into these Ecclesiasticall rights, contrary to the first institution thereof; for when they were first received into the Chriltian world, they were received and yeelded to for the benefit of the Clergie onely, as in former time under the Law, they had beene for the use of the Priests and Levites onely: The other was, the too too much curiosity of Schoolmen, who being not content with the simple entertainment of Tythes into the Church, as the ancient Fathers of the Primitive Church received them, would needes seek out how, and in what right, and in what quantitie this provision belongs unto the Church, wherein they did by their overmuch subtilty, rather confound the truth, than make that appeare which they intended to doe. By the first of these was brought in that great Prescription, which is called the Prescription beyond the *Lateran* Councell, wherby Lay-men held Tythes in fee, without paying any thing therefore unto the Church; and out of that issued the rest of those pettie Prescriptions, which we now have, which are nothing else but imitations of the first. By the second came in Priviledges, Customes, and Compositions; or if they

they came not in wholly by them, yet surely were they much strengthened by them; but of either of these after in their places. But for that of all these forenamed greivances in the Church, as farre as my reading serves mee, Prescription is the eldest, and first rusht into the Church, and violated the Liberties thereof; I will first begin thereby, & shew upon what occasion it first seized upon the Church, and prevailed against her, and then will I speake of the rest in order.

It is out of question, that from the time of *Origen*, who lived within fourescore yeares after the death of Saint *John* the Evangelist, as also did *Cyprian*, who was his coequall in time, and so along by the ages of *Chrysostome*, *Ambrose*, and *Augustine*, and some of the purer Popes, as *Urban* the second, *Dionysius*, and *Gregory* the great, there was good use of Tythe in the Churches, where Christian Religion was imbraced, as may appeare by every of their testimonies, that God hath not appointed it to bee a provision onely for such as served at the Altar under the Law, but also was purposed by him from the beginning, to be a maintenance for the Ministerie under the Gospell: and therefore *Origen* in his xi. Homily upon *Numbers*, speaking of Tythes, saith thus, I hold it necessary that this Law or Precept be observed according to the letter: and upon the 22. of *Matthew*, hee thinketh Christs words uttered there as concerning Tythe, to be a precept no lesse necessary for the use of Christians, than they had beene for the Iewes: and therefore hee accounteth Tythe neither Ceremoniall, nor Iudiciall, but morall and perpetuall. *Cyprian* in his lxxvi. Epistle, adviseth the Clergie of his time, since they had Tythes allotted unto them for their maintenance, they should not absent themselves from Gods service. *Chrysostome* upon the viii. of the *Acts*, useth this argument to persuade husband-men to pay their Tythes truely unto the Church: That it is good for them so to doe, for that there are continuall prayers and intercessions made for them by the Ministerie. *Jerome* upon *Timothie* saith, The precept of payment

payment of Tythes, is aswell to be understood in the Christian people, as in the Jewes. Reade *Ambrose*, in his Lent Sermon, and *Augustine* in his xliiii. Homily, and *Gregorie* in his xvi. Homily, and you shall finde no lesse plaine places for the continuance of the payment of Tythes among the Christians, than the former were. Adde to these the practise of *Dionysius* himselfe, who by *Jeromes* account flourished in the year 266. who not onely divided out Parishes, drawing the example thereof from Saint *Paul*, who first appointed Bishops in Cities, but also assigned orderly to every Parish his Tythes. All which held in the Christian common-wealth, in a decent and comely sort, untill the irruption of the *Hunnes*, *Gothes*, and *Vandals*, upon the Christian world, who first invading *Italie* under the Emperour *Justinian*, did for many yeares so harrow the whole Countrie, and specially *Lombardie*, as that they left not almost a man of excellent Religion any where unpersecuted, overturned Churches, burnt Libraries, overthrew Schooles of learning, and to be short, what wickednes did they not? insomuch as *Gregorie* the great, being otherwise a very good man, and one that did relye himselfe upon the providence of Almighty God, verily thought and taught that the end of all things was then come: but after those fierce and barbarous people once set their face to goe against *France*, (which had beene hitherto free from that inundation) which happened in the dayes of King *Theodorick*, who lived about the 650. yeare of the incarnation of our Saviour Iesus Christ; *Charles Martel* the Father of *Pipin*, after King of *France*, being then great master of the Kings house, would not (although otherwise hee were a very victorious man, and valiant Captaine) oppose himselfe against them, unlesse the under-Clergie of *France* would be content to resigne every man his Tythes into his hands, that thereby hee might reward the Souldiers, and support the charges of the warre then present: which the poore Clergie, in respect of the eminent danger, & for that *Charles Martel* himselfe did solemnly vow and promise, that

that they should be forborne no longer, then for the time of the warre, and that they should be restored unto them againe at the end of the warre, with a further gratuitie for their good will, yeelded most willingly thereunto, specially the Bishops not contradicting it, leaving to themselves a small portion of their living onely, during the time of the danger. Whereupon *Charles Martel* undertaking the enterprize, got a mighty great victorie against the enemies, insomuch that hee slew in one battell 34500. of the Infidels: which battell being happily atchieved, and the danger of the warre being past, the poore Clergie-men hoping to receive againe their Tythes, according as it was promised them by *Charles Martel*, they were put from the possession thereof, and say or doe what they could, their benefices were divided before their face, in recompence of their service, to such of the Nobilitie as had done valiantly in that action, and the same assured to them and theirs for ever in fee. And this is the first violence that ever Tythes suffered in the Christian world, after they left the Land of *Jurie*, and came to inhabite among the Christians; which albeit was a nefarious act, and nothing answerable to the late mercy that God had vouchsafed them in conquering of their enemies, yet there wanted not like sacrilegious mindes in all Christian Lands, which did imitate this wicked fact of *Martellus*, insomuch as the example hereof passed over the *Alpes* into *Italie*, and mounted above the *Pyrenean* Hills into *Spaine*, & within a short time after sayled over into *England*, in such sort, as that even to this day sundry monuments thereof appeare every where in the Land, where any title of immunitie is challenged from payment of Tythes, reaching beyond the *Lateran* Councell, which can descend from no other head, than from that fact of *Charles Martel*; neither was there any redresse thereof untill the said *Lateran* Councell, before-mentioned, which notwithstanding came neere five hundred years after: for this fact of *Martellus* was done about the sixe hundreth and threescore yeare after the Nativitie of our Saviour Ie-

his Christ; but the Councell that reformed it, and was holden under *Alexander* the third, was not celebrated before the yeare of Incarnation 1189. neither was the reformation thereof at that time totall, nor suitable to the first institution of Tythe among Christians.

For neither could many wilfull and refractarious persons be then brought to obey the Canons of the Councell, in restoring any part thereof againe unto the Church, although they were charged so to doe under paine of damnation. Neither did all such as did then restore them, restore them to the Churches from whence they were taken, which had beene most agreeable to the ordinance of the Church, set down by *Dionysius*, who first divided Parishes and assigned unto them Tythes, as hath beene aforesaid; and also to the Scripture it selfe, *Deut.* 18. from whence *Dionysius* tooke his light to deuide Parishes and dispose of Tythes as he did, by which it was not lawfull for him that paid his Tythes to pay them to what Priest or Levite him liked, but hee must pay them to the Priest or Levite that dwelt in the place wher himselfe made his abode: but yet this libertie that was given them by the Councell, then gave cause unto the error that the Common Lawyers hold at this day (not knowing the ancient proceedings of the Church in these cases) that before the *Lateran* Councell, it was lawfull for every man to give his Tythes to what Church he would, which was so farre otherwise, as that before this violence offered unto the Church, there was a flat Canon, more ancient than the fact of *Charles Martellus*, which did precisely forbid any man to pay, or a Bishop to give leave to any man to pay his Tythes from the baptisimall Church to an other: and that the contrarie was yeilded to in the *Lateran* Councell, was not that they held it lawfull to enrich one Church in this sort, with the impoverishment of an other, but the cause was the hardnesse of mens hearts, who scarcely could be won by this favour to restore that little againe unto the Church, that their forefathers had in such abundance taken away from it:

L. 4. 13. 9. 1. c.
Eccl.

it: and that the fathers of the said Councell did yeeld thereunto (although it were an inconvenience thus to doe) was, for that they did count, although they did admit that it might be for the present, yet there might bee a better time found out after for the reformation thereof, and so sustained the inconvenience for the present upon this reason; that the universall Church of Christ is one body, & every particular Church a part of that body, and soe it lesse mattered to what particular Church they were restored, so that they were restored at all: for that by the restitution to one they hoped in time they might have more likelihood come unto the other; for those things wherein there is an Identitie, or like representation of Nature and Condition, as it is betweene Church and Church, have an easier passage the one from the other, than those that are of different nature and disposition, as a lay man and a Church.

SECT. 3.

That out of that violent Prescription, many other Prescriptions arose, but of lesse moment.

OUt of the ruines of this violent and presumptuous prescription, which hath now obtained strength of a Statute in the world have issued out sundry petty Prescriptions, which also are confirmed by law and custome, as the other were; as the Prescription wherein one Church prescribeth Tythes against an other Church, the Law punishing therein the negligence of the one and rewardeth the vigilancie of the other: Prescriptions, wherein one Ecclesiasticall body corporate or politique, prescribeth Tythes or other Ecclesiasticall duties against the Parson or Vicar of the Parish, and the Parson and Vicar againe against them: A Prescription whereby a Lay man, having no right to prescribe Tythes (Because hee can in no right possesse Tythes, & prescription cannot proceede without possession) doth notwithstanding by pernancie, or giving some part of his

Regul. sine possessione de regularibus juribus in 6.

Y 2

ground

ground or pension in money in lieu thereof, prescribe a discharge thereof: A prescription wherein a Lay man doth prescribe the manner of Tything, which albeit by the Common Law is counted to be good by paying a thing never so small in lieu thereof, yet neither by the Canon Law, neither by the Law of God it selfe, could it ever be lesse than the just tenth it selfe; so that the manner of Tything with them is not understood in that sence, as the Common Lawyers doe take it, by paying any thing whatsoever in place of the just tenth; but their intendment hereby is, that no countrey can bee bound to an uniformitie of payment of Tythes to bee used every where: but every man is to pay Tythes according to the manner of the Countrey where hee dwells, that is, that one payes his Tythe-corne, and bindes up the same in sheaves, an other leaves it scattered in the furrowes, an other tythes it in Cocks or Pookes; and this is it that they meane, that there cannot be an uniformitie of Tything prescribed to every man, after which he is of necessitie to set out his Tythe, but that he may prescribe some other manner of Tything against the Parson or Vicar: but against that uniformitie that the whole Tythe should not be paid, was never any prescription allowed among them, for they evermore have beene of this minde, contrary to that which the Schoolemen hold, that Tythes are part of the Morall Law, & not of the Iudiciall or Ceremoniall Law; and that in the Precept of Tythes, there is a double consideration, one of the honour of God, whereby he retained tythes unto himselfe, in signe of his universall Lordship over the whole world, which is irremissible; the other of the profit or utility of man, in that it concernes the provision of the Minister in all ages, which is undispensible.

*Linwood. Pro-
vin. quoniam
verbo unifor-
mis in Glo. de
decim.*

*Eod. verbo con-
suetudines.*

*Cap. à nobis de
Decimis in
Glos.*

SECT. 4.

That Ecclesiasticall Iudges admit pleas in discharge of tythes and the manner of tything, contrarie to the conceit that is had of them.

ANd yet, notwithstanding all this, the Ecclesiasticall Iudge admitteth all kinds of prescriptions before-named, and according to the proofes thereon brought, giveth sentence either to absolution or condemnation: albeit the Reverent Iudges of the Land, upon an erroneus report made in the eightyeare of *Edward* the fourth, have a conceit to the contrarie, viz. That no Ecclesiasticall Iudge will admit any Plea in discharge of Tythe, or the manner of Tything, as it is in their sense taken; and therefore they hold whatsoever the Defendant doth alleadge in his suite for a consultation, and namely that the Ecclesiasticall Iudge did allow of the Plaintifes Plea and allegation, and did admit him to the proofes thereon without deniall, are idle speeches, & rather words of course than of effect & substance. And therefore notwithstanding, whatsoever is alleaged by the Defendant, as concerning the Ecclesiasticall Iudges well acceptance thereof, it is counted nothing materiall by the Temporall Iudges, for that they have a prejudicate opinion of the Ecclesiasticall Iudge in these cases, and therefore howsoever the refusal be, or be not, they grant out their Prohibition in these cases. And yet if the Iudges, Ecclesiasticall proceedings might be seene, and vouchsafed to be read before them, it would bee plaine, there was no such cause of their hard opinion against them; for every where they doe allow such and like allegations. And if perhaps one inferior Iudge should make refusall as they pretend, yet could it not be reformed by an other in an ordinarie course of appeale, but that there must needs be brought a Prohibition out of the Common Law to redresse the same: unlesse happily they can shew, it is a generall conspiracie in the Ecclesiasticall Iudges, or a Maxime in their learning, that they will

will not or cannot admit any Plea of discharge in this case, which they can never doe. And therefore, they are intreated to change their opinion in this point, and not doe the Ecclesiasticall Iudges that wrong, as to charge them with such an imputation, whereof their whole practice is witness to the contrarie: for it is unworthy such mens gravitie as theirs is, who propound unto themselves the inquirie of the truth in all matters, thus to be misconceived & masked in an error, and that for so many yeares, and not to be willing to heare the contrarie, which is an obstinacie in policy no lesse obdurate, than the Papists is in Religion, who see the truth and will not beleieve it. And so farre as concerning Prescriptions and the first cause & beginning thereof.

CHAP. IV.

SECT. I.

Of Priviledges and how they came in; and that by reason of the frequency of Priviledges, Statutes of Mortmain came in.

Now it followeth, that I speak of Priviledges, which are immunities granted unto private men beside Law.

Of these, some are very ancient, such as true zeale toward the Church bred, & the just admiration of the holy men of God for their sanctimonie of life, their great knowledge in the word of God, their great patience in persecution for Christ and his Gospel, the vigilancie and care they had in their Office, stirred up both the Prince and People. So *Constantine* the great, being ravished with the love of Religion, & the good opinion he had of the Ministers of his time, erected Churches, and endowed them with large possessions, and granted them sundry immunities, whereby they might more securely intend to the preaching of the word of God, and the winning of soules to the Christian congregation,

gation, wherein they laboured with all their might and power, God still adding to the number of the Elect. Neither did he this alone in his owne person, but hee also gave leave to all other of his Subjects that would doe the like: whereupon the Church was so enriched within a short time that as *Moses* in the building of the Arke, was faine to make a Proclamation, that no man should bring in more towards the building thereof, the people bringing in continually such great abundance of all things necessarie towards the furnishing thereof, as that there was enough and much to spare: So also *Theodosius* the thirteenth Emperour after *Constantine* (although otherwise a most loveing and favourable Prince towards the Church) was faine to make a Law of Amortifation or Mortmaine, to moderate the peoples bountie towards the Church; as did also many wise Princes in other Nations upon like occasion, & in imitation of this Act of *Theodosius*, many yeares after; and among the rest, divers Princes of this Land did the like, upon the dotage of the people towards the religious Persons, and specially towards the foure Orders of Friers that were then newly sprung up in the world. But yet this Act of *Theodosius* was done with the great dislike of these blessed men *Jerome* & *Ambrose*, who lived in those dayes; for that *Jerome* thus complaineth to *Nepotian* of that Law: *I am ashamed to say it, the Priests of Idols, Stage-players, Coach men, and common Harlots, are made capable of Inheritance, & receive Legacies, onely Ministers of the Gospel, and Monkes are barred by Law thus to doe; and that not by Persecutors, but by Christian Princes; neither doe I complaine of the Law, but I am sorie wee have deserved to have such a Law made against us.* In like manner, and upon the same occasion doth *Ambrose* deplore the state of the Clergie in his 31. Epistle: *Wee count it (saith hee) no injurie, in that it is a losse, wee are not grieved that all sorts of men are made capable of Wils, none excepted, how base, prophane, or lavish of his life or honesty soever he be, but I am sorie that the Clergie men onely of all sorts of people, are barr'd the benefit of the Law that is common to all;*
who

Magna Charta.
Cap. 56. W. 2. c.
31. an. 13. Ed. 1

Concerning
 this, see what
Peckius saith in
 his Booke *De*
Amortizatione
Bonorum. c. 6.

who notwithstanding, onely pray for all, & doe the common celebration of the Service for all: So farre they.

And yet whosoever looks into this constitution, whereby it was forbidden, that any man should passe any Lands or other unmoveable possession unto the Church, without the Princes leave (for that thereby the things that are so passed, come, as it were, into a dead hand, which holdeth surely fast that which it once apprehendeth, neither easily parteth with it, so that it cannot without much difficulty be reduced and brought again to the commerce & common use of men) shall finde it was rather for the benefit of the Common-wealth, than for the dislike of the Church, that it was so ordered.

For if that course had beene holden on still, the greatest part of the livelihood of the Common-wealth would in short time have come unto the Church, and so Lay-men should not have beene able to have borne the publicke burthens of the Common-wealth; which it concernes Secular Princes to be carefull of, and to foresee, that by overmuch bountie towards the Church, they impoverish not their owne state, and lose the right of Escheats, Primerseisin, and other Priviledges of the Crown in cases of forfeiture, and specially make bare their Lay-subjects, upon whom a great service of the Common-wealth doth lye. And yet otherwise the beneficiallest state of this Realme unto the Prince is the Clergie, as from whom the King hath a continuall revenue in Tenths, and is deepest in Subsidie, and not the least in all other extraordinarie charges, according to the proportion of their place. And therefore, as the King is to maintaine the one, so he is also to cherish the other, and not to suffer their state in any sort to be diminished, for that all other States are made for the service of the Church, and the Church againe for the benefite of them.

But this was none of those Priviledges that I spake of, for these are more ancient than they, and granted out upon better devotion than the other: but after this the zeale of Religion

Religion being almost extinguished in the Christian World) partly by the great uproares and tumults that were in every Countrie, by the breaking in of one barbarous Nation or other upon them, who pulled downe Churches faster than ever they were built, and made havock both of Priest, and people, that professed the name of Christ, partly by the heresies that rose every-where in the Church in those dayes, which distracted mens mindes, and made them waver in the constancie of their Religion (it was revived againe upon this Occasion.

S E C T. 2.

Of the beginning of Cloystered Monkes in the West Church of Christendome, and that the Authour thereof was one Benedict a Roman about the yeare 606.

ONe *Benedict* who otherwise had beene a man of action in the Common-wealth. (that *Benedict* which was, as it were the Father of all those that professed a Regular life, within the West part of Christendome; for before his time the Monks of the West Church, served God freely abroad, without being shut up in a Cloyster) he, I say, finding himselfe wearied with the tumults and broyles which happened under the government of *Justinian*, and some yeares after by the incursion of those barbarous Nations (before named) into *Italy*, retired himselfe into a desert and solitary place, intending there to give himselfe wholly to the service of God: where, when he had a while remained, he grew so famous by his Christian exercises of fasting and prayer, and the good and wholesome exhortations that he made to those who resorted unto him, that within a very little time after, there was great confluence of people unto him, not onely from divers parts of *Italy*, but even from sundry other parts of the World; so that within a short time they grew into Fraternitie underneath him, to whom he gave rules to live by, to the imitation of that, which Saint *Basil* did in the East Church: to which his Disciples submitted themselves with all alacritie, leading

Z

a life

*Hospinian de
origine Mona-
chatûs.*

a life farre different from the common sort of men denying unto themselves all those ordinary delights that other men doe commonly take, out of meat, drinke, apparell, marriage, Temporall preferment, and such other things which worldly and carnall men seeke for very greedily, humbling themselves onely to God, and the rule of their Master. Which thing bred such an admiration of him, and of his Schollers, that not only many other Orders sprang out from them within few yeares ; as the *Pramonstratenses*, *Cluniacenses*, *Templarians*, *Hospitallors*, *Cystertians*, and the order of Saint *John* of *Jerusalem*, but even Popes, Princes, and people were wholly carried away with the wonderment of them, insomuch as every of them did as it were strive, who might shew themselves most kinde unto them ; thereupon Princes built them houses, every one in his Kingdome, as *Clito Ethelbald* King of *Mercia*, built the Monasterie of *Crowland* here in *England*, of blacke Monkes, under the rule of the said *Benedict*, in the yeare 716. Popes and Princes granted them priviledges, so farre as it concerned either of their particulars: the Clergie, Nobilitie and People, conferred goods and lands upon them, every one according to his abilitie.

SECT. 3.

That the admiration which these Religious Men did breed of themselves in the heads of Princes & Popes, did procure appropriations of Parsonages, and Immunities from Tythes. And that the over-conceit which men had of prayer above Preaching in the Church, was an adjuvant cause thereunto.

IN this zealous bounty of every degree towards these new sorts of men, there are two undigested Priviledges granted them, both of them so hurtfull and injurious to the Church of God, as never any was the like. The one was the Annexation or Appropriation of presentative Benefices to these Religious houses : The other, the freeing of such Lands or Hereditamēts, as they held in sundry Parishes from

from the payment of Tythes to the Parsons and Vicars thereof; to both of which the Shool-mens Divinity gave great advantage, as shall be shewed hereafter.

Either of these had there beginning of one roote, that is to say, of this false ground, that preaching, which is the most true, and most naturall foode of the Soule, in a Congregation that is to come to the profession of Religion already, and knowes but onely the Articles of the Christian Faith, the Lords Prayer, the Ten Commandements, and other Principles and Rudiments of Christian Religion, is nothing so necessary for the Salvation of a mans Soule, as Prayer is: Besides, that Preaching oftentimes gives more cause of Schisme, and dispute in Religion, than it doth of profiting and edifying the Soule: and therefore it was not permitted by the Provinciaall Constitutions of this Realme, that Parsons or Vicars of Churches, should expound or preach any other matter or doctrine, then the Lords Prayer, the Ten Commandements, the two Precepts of the Gospel, that is, the love of God, and the love of a mans Neighbour, the sixe workes of Mercy, the seven principall Vertues, the seven sacraments, (for so many then the Romish Church held) the seven deadly sinnes, with their progeny; and this to be done vulgarly and plainly, *Absque cuiuslibet subtilitatis textura fantastica*, (for so they call learned and orderly Preaching;) whereas notwithstanding Prayer is evermore profitable, every where necessary, and never dangerous: Futhermore, Preaching onely profiteth those that be present, and doe heare it, and attend upon it; but Prayer is available even to those that be farre distant, yea though they be in the remotest place of the world. By which, and other like arguments, they translated away that maintenance that was provided for the home Pastors, (who by Gods owne institution, were to watch over their Soules) to forreine and strange Guids, who never communicated to their necessitie in any heavenly comfort, but onely tooke the milke of the flock, & fed themselves withall. But by this pretence of theirs, ought not Preaching to have beene discharged; for albeit Prayer bee a necessarie

*Linwood pro-
vin. eiusdem, de
offic. Archidia.
coni, & cap. Ig-
norantia Sacer-
dotum, de officio
Archipresbyteri.*

† But here it will neede, that the Reader use a sober judgement; for it can not but bee though: unequal, that Prayer and Preaching should bee so unwarily plac'd in competition, as that Prayer should lose by the com-

parison. There may be alwayes need of Preaching, but then most of all, when the Auditory is unchristian. This reason prevail'd for all places in the first times, but in these last only for some, according to which it were unprofitable to goe about to covert the *Indies* no otherwise than by our Prayers. Yet even in those primitive times, which had most cause to call for Preaching, we shall find that this duty was of rarer exercise, and lesse solemnity than that of Prayer, as it may abundantly be discovered out of the Liturgies of both the Churches. And it is observable, that where Preaching hath beene of the greatest account, it hath bin so much beholden to Prayer, that it was not onely begun and ended, but also discontinued by devotion: For wee shall finde the Reverend Fathers *Chrysostome* and *Basil* of *Selencia* at prayers in the middle of a Sermon: See the one in his 39 *Orat.* the other in his 3. *Hom.* Περὶ Ἀρεταλήτης, &c. *Moses* the Sonne of *Masmon*, that profound Doctor of the *Jewes*, instituting a comparison betwixt their Sacrifices, and the more substantiall Services required, in stead of all other, nameth that of Prayer and Invocation and of these he saith, that they are-- &c. וְתָרַקְוָהוּ אֶל הַכֹּהֵן הָרִאשֹׁן, nearer to (Gods) first intention, and hat our way thereunto, is by them: and afterwards he saith that these are necessarie-- כָּכָל זְמַן &c. כָּכָל מְקוֹם כָּל מִי שִׁירָמָן in all places, and for every man, See his *More Nevoch*, *Helec.* 3 2. p. קנן. And holy *Antioch* in his 106 *Hom.* which is περὶ προσευχῆς saith of Prayer (ὅτι) ὑψηλότερα τυγχάνει πυστῶν καὶ ἀρετῶν, that it is of a more sublime Condition than any other vertue. And how our Lord himself (too) affected to this, wee may acknowledge by that, where hee calleth the Church, his *House of Prayer*, not *Preaching*; which took so well in the elder times, that all their Temples were known by the name of *Εκκλησία*, Oratories. Nay the Preacher himselfe, *Prov.* 15. is so confident of a just mans Prayer, that he dares say, that God will even be obedient to it (for so ἐπακούει or ὑπακούει is rendred by the Interpreter of the fore-named *Antiochus*.) However. It may seeme to be so, for when all the Preaching of *Lor* could prevaile no otherwise, than to bring vexation to his righteous Soule, the Prayers of *Abraham* might have saved *Sodom* if among so many thousands, there had beene but ten just men.

All this while wee would not detract any thing from Preaching, but considering our selves to live under a State so maturely composed, and so thoroughly advised and settled in the Faith, it will be expected, that we should so farre moderate our opinion of Preaching, as that our magnifying thereof, may no way tend to the discredit or disadvantage of most necessarie Prayer.

SECT. 4.

Whether Appropriations came first from Princes or Popes it is questionable.

BUt how these annexations of Benefices first came into the Church, whether by the princes authoritie, or the Popes licence, it is very disputable, and there are reasons on both sides for to shew the same.

For whereas there are reported by *Ingulphus* Abbot of *Crowland* before mentioned to have been eight Churches beside the Patronage of some other, annexed and appropriated to the said Abbey, by sundry *Saxon* Kings, it doth not appeare, by ought I can finde, whether they were done by the soveraigne authoritie of the kings alone, to the imitation of that, that was done by *Martellus*, who made all Christian Kings to sinne in this point, or that it was done by any other Ecclesiasticall authoritie, for that there is nothing extant for the allowance thereof, save the severall Charters of those ancient Kings onely: and that I should be the rather induced to beleieve that it was done by those Kings authoritie only, I am thereto persuaded, for that I finde *William* the Conquerour, immediatly upon the great victory that he got over this Kingdome, to have appropriated three Parish Churches to the Abby of *Battaile*, which hee built in memory of his Conquest. And whereas *William* his sonne had depopulated & overthrown sundry Churches in the new Forrest, *Henry* his brother by his Letters Patents gave the Tythe thereof to the Cathedral of *Sarum*, & annexed therto twenty other Churches in one day; if the copie of that record that I have seene, as concerning these appropriations, be true, yea the matter was gone so farre in those daies, that even Noble persons and other meaner men would command Corodies & pensions to their Chaplaines, and other servants, out of Churches, and this could not be redressed, untill such time as there was made a Statute to reforme it.

*Ann. 1. Edw. 3.
c. 10.*

Linwood c. licet
bona memoria.
Gloss. in verb.
asserunt non li-
gar. de locato
& conducto.

On the contrary side, that I should take it to be a devise of the Pope, I am moved thereto, for that I finde every of these orders of Religious men were confirmed by one Pope or other; & as they confirmed them, so it is like they made provision for them, and that most especially this way, and that chiefly after the Lawes of Amortisation were devised, and put in ure by Princes; and thereupon it is that wee find sundry sorts of annexation made by Popes and Bishops under them, every one in their Diocesse: as some were made so farre as concerned the Patronage only, and then had the Monks therein presentation only: some other were made *pleno jure*, and then might the Monkes both institute and destitute therein without the Bishop, and turne all the profit thereof to their own use reserving onely a portion to him that shall serve the Cure there: some other Churches did they grant simply to them without any addition of full right, or otherwise: & then if the Church were of their owne foundation, they might Chuse, the Incumbent being once dead, whether they would put any other therein, unlesse perhaps the same Church had people belonging unto it, for then must they of necessity still maintaine a Curate there; and of this sort were the Granges, & Priories, & those which at this day we call Donatives: but if it were of another mans foundation, then was it otherwise. To this also I adde, that the Pope every where in his Decretals, arrogateth this right unto himselfe, as a Prerogative of the Apostolike See, to grant these priviledges to Religious orders, to take & receive Benefices at Lay mens hands, by the mediation of the Diocesan, whose office it was to be a meane betweene the Religious house & the Incumbent, for an indifferent rate, that neither of them should presse too much the one upon the other: & therfore in the beginning, the usuall rate that they set downe between the beneficed man, and the Religious person was the one halfe of the benefice; for that it was not thought that the Pope would charge a Church above that rate. But after by the coveteousnesse of Monkes & Friars themselves, & the remisnesse

misnesse of Bishops who had the managing of this businesse under the Apostolique See, the Incumbents part came to so small a portion, that *Urban* the fifth, by *Othobon* his Legate here in *England*, in the yeare of Salvation 1262. was faine to make a Legantine, whereby hee forbad all Bishops of this Land to appropriate any more Churches, to any Monasterie, or other Religious houses, but in cases onely, where the persons, or places to whom they were appropriated were so poore, as that otherwise they were not able to sustaine themselves; or that they were so just, that it might bee taken rather to be a worke of charitie, than any inforcement against Law: and that beside with this proviso; as that if the new proprietaries within sixe moneths next after, should not set out a competent portion for the Minister, of the fruits of the Benefice, themselves should assigne out a sufficiency thereout, according to the quantitie thereof: Which constitution, because it tooke not the effect that was hoped, there were two Statutes made, the one by *Richard* the second, the other by his successour *Henry* the fourth, both for the convenient indowment of the Vicar, there to doe divine service, and informe the people, and to keepe hospitalitie among them.

Albeit most of these Appropriations were principally in Monkes and Fryers, and such other Religious persons, yet were not Bishops Sees, and Cathedrall Churches altogether free from them, as I have before shewed in the Cathedrall Church of *Salisbury*, to whom *Henry* the first appropriated neere twenty Churches in one day: and the See of *Winchester*, which hath had two Benefices anciently annexed to the Bishops table, the Parsonage of *Eastmeane*, and the Parsonage of *Hambleton*. Neither doe I doubt, but the like was done in other Bishops Sees, and other Cathedrall Churches, if I had as good instruction to report of them, as I have had information to speake of these.

And so farre as concerning the first effect of Priviledges,
whereby

whereby sundry fat Benefices have been injuriously drawn from their owne Churches, and unnaturally appropriated to Monkeries and Fryeries, and other secular, and religious places; which as I have said, hath beene partly the act of Lay men, and partly of Ecclesiasticall men.

S E C T. 5.

Exemptions from Tythes brought in by Pope Paschals, favour towards all sorts of Religious men, and how they have been restrained by Pope Adrian.

*C. Ex parte tua.
glos. in verb. la-
borum de De-
cim.*

*God. in dista
glos.*

NOW followeth the second effect hereof, and that is, the exemption of these Religious mens possessions from payment of Tythes, which is a priviledge of the Pope alone: for Monkes anciently paid Tythes of their land, before these priviledges, as other Lay-men did. But *Paschalis* the second, casting a more favourable aspect towards Monkes, and other Religious men, than any of his Predecessours before time had done, did order together with the Councell of *Ments*, That neither Monkes, nor other Religious persons, or any other that lived in common, should pay Tythes of their own labours: Which immunitie in proceffe of time, Pope *Adrian* recalled, so farre as it concerned the rest of the Religious persons, and limited it onely to the *Cystertians*, *Hospitallers*, *Templers*, and those which were of the order of *S. Johns in Jerusalem*, leaving onely to the rest freedome from paying Tythes of lands newly broken up, and labored with their owne hands, and of their garden, and of their cattell. In which state the matter stood untill *Innocent* the thirds dayes, who although he were in no other point of better mould than the rest of the Popes were; yet was hee in this more pittifull towards poore Incumbents of Parish Churches, than any of his predecessors had been; who seeing hereby the inconveniences of beggery & ignorance that grew upon sundry of the Parochian Priests, by meanes of these Priviledges, ordered in the
second

second *Lateran* Councell, holden in the year of grace 1120. *C. nuper Abbas, de decimis.* that for such lands as any of the said foure Priviledged orders should acquire, & get after the said generall Councell, they should pay Tythes, or compound for them as other men did, yea though they laboured them with their owne hands, or manured them at their owne charges. Which consideration also moved *Henry 4.* King of this Realme, to provide by Statute, first, that such of the order of *Cystertians*, as had purchased Bulls to be discharged of Tythes, should be reduced into that state as they were before: Then, that no person Religious or Secular, by colour of any Bulls, containing any priviledges, to be discharged of Dismes pertaining to any Parish Church, nor put in execution, should put the same in execution, or should purchase the like in time to come. *An. 2. Hen. 4. cap. 4.* Whereby it is very probable, that few of those lands which *An. 7. Hen. 4. cap. 6.* are now challenged to bee free of Tythes by the Statute of the 31. of *Hen. 8.* are free of Tythes indeed: for that they are no otherwise freed by that Statute, than that they were first freed in the Religious mens hands; so that if they were never freed in their hands, they remaine still charged with Tythes. But betweene this interruption of not paying of Tythes, wrought by *Innocent*, in the second *Lateran* Councell, and the dissolution of Monasteries, effected by *Henry* the 8. are three hundred and thirty yeares, and betweene the foresaid Statute, made in the seventh yeare of *Henry* the fourth, and the subversion of the Monasteries, brought to passe by *Henry* the eighth, as hath beene before remembred, are one hundred and thirty yeares. In which long distance of time the one from the other, it is not to bee doubted, but many of those Religious Houses were built and indowed, which by no possible meanes could bee partakers of those priviledges which were abolished before the time of their erection: neither was there any reviving or renewing of these priviledges by any Pope of *Rome*, or Prince in this Realme, after they were thus first repealed by the Pope and Prince aforesaid, for ought that I have read, or heard to the contrary.

So that if this matter were well understood, and the ages and orders of these Religious persons, from whom the clayme is made, were rightly conceived, it would give great light unto the Judges, to discern what lands were exempted from the payment of Tythes, and what not: for now many are pretended to bee exempted from Tythes, which never were of any of those foure Orders, and if they were, yet were they not before the time of the interruption, but since.

S E C T. 6.

That reall compositions for Tythes, are the devise of Ecclesiasticall Lawyers, and are to bee tryed by the Ecclesiasticall Courts.

ANd so far as concerning the second effect of these Priviledges. Now it followeth that I speak a word or two of Compositions, which are agreements betweene persons litigant, whereby either partie may know their owne right, and not strive againe about doubtfull matters. As good Lawes have growne out of ill manners, so Compositions have risen out of quarrels, caused by priviledges, and other like exemption for matter of Tythe: whereof, although there bee no speciall Treatise in the Law, as there is of the rest, yet they are so often mentioned by the Decretals themselves, as that it is not to bee doubted, but that they are part of the Ecclesiasticall Law, as well as the rest are, and that they are the devise of the Ecclesiasticall Lawyers, and not the conceit of the Common Lawyers, the forme and stile of them doe well shew, which savoureth wholly the maner and phrase of writing of the Ecclesiasticall men, & hath no touch of the Common Law at all. And if the devise be the Ecclesiasticall mens, as all Bishops Registers every where doe shew, which are full of these compositions, why should not also the triall be theirs, that every cause might have his ending, where it hath his beginning? *Eorum enim est legem interpretari, quorum est condere.*

S E C T. 7.

S E C T. 7.

*That the curiosity of Schoole men in their distinctions upon Tythes, have helped forward Appropriations and Exemptions from Tythes. The opinion examined, as concerning the Quotitie of Tythes, whether it be Morall, Ceremoni-
all, or Iudiciall.*

ANd these are those greevances of the Church, which I said the Schoole-mens curiositie in their distinctions, either invented, or gave strength unto them after they were invented; but invent them all, I thinke, they did not, for that these Acts of Appropriations of Benefices were somewhat more ancient than the School-men themselves are: but the rest of the Priviledges, they either came into the world with them, or ensue anon after them, so that I may well say, they much strengthened this iniquitie. For when that every man understood by their Doctrine the quotitie of Tythes, or the tenth part thereof was not precisely by Gods Law (since the light of the Gospel sprang out as the day-light unto the Christians, who before sate in darkenesse, and in the shadow of death) but that it was by the institution of the Church only; then began they freely to spoyle the Church of her due Tythes, and to give away that to one Church, that was due to another. And the reason that perswadeth the School-men to this, was, that after much adoe, dividing the whole Law of *Moses* into three parts, the Morall, the Iudiciall, and the Ceremoni-
all; they did conclude, that there were three parts likewise in the Tythe, the one Morall, which was a necessary maintenance for the Minister, and therefore was naturall and perpetuall: the other iudiciall, which was the number of ten, fit, as they taught, for that people onely, and therefore was positive and remotive: the last Ceremoni-
all, and that was the mysterie contained in this Quotitie, or number of Ten, which being but a shadow onely, was abolished with the Law it selfe: whereby they did inferre the precise number of Ten being

taken away, by reason of the Ceremonie it selfe, a competence now onely doth remaine for the Minister out of the Tythes : which opinion hath beene well confuted of late, by a very learned man, as his Treatise thereof doth well shew; but I feare with lesse successe, than the truth of the cause doth deserve, for this is a point that toucheth many mens private benefite, and therefore shall have no more favour than it needs must.

*Thom. in quod.
libet. part. 3. art.
6. q. 6.*

*Idem part. 22.
q. 87. art. 1.*

But the devise whereon the Schoole-men did build this Ceremonie is this, that as all Digits under ten are unperfect, and doe tend to ten as to their perfectnesse; so all men, save Christ alone are unperfect, and have need of Christs righteousness to make them perfect: Which *Abraham* well knowing, paid Tythes to *Melchisedech*, who was the figure of Christ, as therein acknowledging, that himselfe and all mankind, who were represented by the other nine Digits, were unperfect by reason of Originall Sin dwelling in them, and therefore had need to be perfected by Christ, who was figured by the tenth number.

All which that we may grant to be true betweene Christ and all mankind, as it is true indeed, and that ten is the perfection of the other numbers under ten, for that all the rest of the Digits, when they come to ten, returne back againe to ten, and are multiplied by the coupling of themselves with ten: yet, where is this proportion betweene Christ and ten in the Scripture, that should make this Ceremonie? which if it cannot be found any where, nor any consent of the Primitive Church shewed for it, as I thinke it cannot be, then may it with as good authoritie be rejected as it is received. For albeit *Thomas Aquinas* himselfe was tearmed an Angelicall Doctor, that is, such a one as had a sense in the understanding of the holy Scripture above all others of his age, and that he did much profit the studie of Divinity, with his wittie distinctions: yet is not his authoritie such, that it must prevaile in cases of Divinitie, without the authoritie of the Scripture, and the consent of the ancient Fathers of the Primitive Church, interpreting this peece of Scripture
in

in that sense as he doth, which would make a sweet harmonie if it might be had.

And therefore as to my poore sence, better said a learned man of our time to this point, writing upon the Sabbath day in the second of *Genesis*, which may be also proportionably understood of the tenth, for that they were both before the Law in their very number, and were but repeated by *Moses* under the Law, because they had been approved by God before the Law in the selfe same numbers: and that which he saith of the Sabbath is this, that albeit it hath a Ceremoniall designation of the day, that is, that it doth figure unto us our perpetuall rest, which we shall have in heaven, after that there is a new heaven and a new earth, yet there is therein two parts, the one naturall, the other positive, as that God should have a seaventh day of worship, this is Naturall, and therefore doth remaine, because it is perpetuall: but that this seaventh day of the Lords worship should be the seaventh after the Creation of the world, this was positive, and therefore was changed by the Apostles and blessed men of the Primitive Church, into the seventh day after the Resurrection of our Saviour Iesus Christ: which, as it is verified by him in the Sabbath, so may it be in like sort vouched by like reason in the tenth, wherein also by like semblance there are two parts, the one naturall, the other positive. The naturall is this: that God out of all the fruits of the earth, the increase of cattell that are worthy of him, and fit for mans use, should have a tenth, both in the acknowledgement of his universall government over us, and also for the provision of his ministers, and therefore this remaineth: & in that sence immediately after the dissolution of the Jewes policie, the good Christians of the Primitive Church, as soone as they could get any outward forme of a Church, and peace from persecution, received it in the very quotitie, as a thing no lesse belonging to their Ministers, than it did appertaine to the Priests, and Levites of the Law: But that the Lord annexed these Tythes by *Moses* to the Priest and Levites for their maintenance, during the time of the dis-

*Funius in 2. c.
3. Genes 2. c.*

penſing of the myſteries under the Law, this is poſitive, and therefore changed by the good Chriſtians in the Primitive Church, from the Jewes Eccleſiaſtiques to the Chriſtian Eccleſiaſtiques.


Neither can it bee thought that this number came from the judiciall part of the Law, as a fit proportion to maintain one Tribe, out of the revenues of the other eleven Tribes: for that this number, or quotitie was revealed to bee Gods long before the Law, and before there were any ſuch diviſion of Tribes among the people of Iſraëll; which then were not, but were parted afterward by *Moses* into families according to the number of the twelve ſonnes of *Jacob*. And therfore it is not to be preſumed, that the Law which came long after, imprinted a forme upon that, which was ſo long in beeing before there was any Law or Ceremony. But as the Apoſtles, or prime Chriſtians, when as they did firſt change the day of the Sabbath by divine inſpiration, or otherwiſe, from the day of the Creation, to the day of the Reſurrection, durſt not ſubſtitute any other day into the place of the firſt day, than a ſeaventh; for that the Lord had revealed his pleaſure in many places of the Scripture as concerning that number, for his day of worſhip, ſo that no other day could bee appointed for his day of worſhip than a ſeaventh: So neither durſt the good Chriſtians of the Primitive Church (moved no doubt with no other inſtinct then the other were, when they tranſlated this proviſion of Tythes for their miniſtery from the Jewiſh Church unto their owne Church) change the number of ten into another number beſides, more or leſſe: For that God had no leſſe manifeſted his will in ſundry parts of the Scripture, as concerning this number, to bee a number for the maintenance of his miniſterie, than he had declared his pleaſure as concerning that other number to bee a day for his honour, challenging it every where in the Scripture, in the very quotitie for his owne right, and counting it robbery if it were at any time with-holden from him. And therfore it may be well thought, that School-men herein did great wrong

wrong to the Church, who by their quaint distinctions brought this certaintie into an uncertaintie, which is no where to be found in the Scripture. Which I am more bold to speake, for that I see some have trod this path before me, and shewed by good demonstration, that the turning of this quotitie into a competencie is a thing nothing warrantable by the word of God, but that the quotitie ought still to stand as a perpetuall right due to God and his Church. But hereof hitherto.

CHAP. V.

SECT. I.

That a Bishop being Lord of a Manor, and prime Founder of a Benefice, could not in the first erection thereof in his owne capacitie, retaine any Tythes in his owne hand, and passe the same after in Lay-fee to his Tenant, and so give cause to his Tenant of prescriptions against the Parson.

Nd so having passed over this whole Proviso of Law, Statute, Priviledge, Prescription, and Composition. I might well leave the turning of this stone any more, but that yet there remaineth one Prohibition of prescription to be handled, which in my fancie is worse then all the rest, for that it draweth away from the Parochian Church her maintenance, & transferreth it upon Lay: and that which is worse, it makes Bishops to be instruments hereof, who are to bee patrons and defenders of Churches, and not pillars or pollers of the same. And yet the authors thereof doe imbrace it, and kisse it as a golden birth, or as if that *Juno* her selfe had beene present at the Nativitie thereof. And the devise is this.

A Bishop being owner of a Manor, yet not divided into Tenancies, nor having any Parsonage erected upon it, ordaineth the one, and divideth out the other: here the Bishop

shop being seised in the whole Manor before the said division, because hee is a Clergie man, is supposed to be in possession as well of the Tythes, as of the Manor it selfe, and therefore after creating a Parsonage, and dividing out his Tenancies, may retaine and keepe to himselfe, and his said Tenants, so much of the said Manor discharged of Tythes as him listeth, & assigne over the rest for the maintenance of the Minister, and that his Tenants after may challenge exemption from Tythe, as the Bishop did, for that they were exempted by his capacitie while they were in his owne hand.

Neither of which is so by Law; for insomuch as a Bishop is an owner of a Manor, and is a prime founder of a Benefice, he hath no more right to the Tythe thereof than a meere Lay Patron hath, who for his zeale to the Church, & to incourage others to be like affected to Gods Religion as himselfe is, may have some small pension assigned him and his for ever by the Bishop out of the same benefice, in acknowledgment of the erecting, founding, or endowing thereof: but for any portion of Tythes to him or his, hee could never retaine any, nor can to this day, neither yet can the Bishop himselfe, unlesse perhaps he will be like to *Ananias & Saphira*, which held part of the price of their ground from the Lord, and were worthily punished for the same. And as they cannot detaine it themselves, being spirituall men, so much lesse can they passe it over to any Lay man, for that Lay people neither by Gods Law, neither by Canons and Decrees of the Church, were ever capable of them: yea, it was so farre off, that ever any Bishops durst infeoffe any Lay man in Tythe; that whosoever did it, was to be deposed & excommunicated untill such time as he restored the same to the Church againe. And to say the trueth, Tythes were never at any time in Bishops as in Fee, but in very few cases, as where the Bishop had a Parish himselfe, distinct from other Parishes, for sundry Bishops in sundry places had so, and then the Tythes of the Parish did belong unto them, in such sort, as they do now belong unto the Incumbentes

Aborum. 5.

*Ca. quamvis de
decimis. & ibi
Abnum. 5.*

*Ca. tunc nobis de
decimis.*

cumbents thereof: Or, if the Tythe were not within any Parish, for then in like sort it did belong unto the Bishop of the Diocesse, in whose Territory it was; albeit, now within this Realme it belongs unto the King: or where the Parishes were undistinguished, for then were they the Bishops, not to convert to his owne use, but to divide among the Ministers and Clerkes, which laboured in the Diocesse, under him, in Preaching, Teaching, Ministering of the Sacraments, and executing of other Ecclesiasticall functions, every one according to his desert: Or, that it were the fourth part of the Tythe, for then did it belong to the Bishop in Law, towards his owne reliefe, and the repairing of the Parish Church where they grew, and not to conferre or bestow the same, as him thought best; which notwithstanding now also is growne out of use, and nothing left unto the Bishop from the Churches of his Diocesse, beside his Procurations, and Synodals, to be paid by the Incumbents in the time of his Visitation. Beside which cases, it cannot be found, that ever any Bishop had to doe with Tythes, much lesse to alyen, dispose, and transferre the same as him listed, to whom him listed.

S E C T. 2.

That Bishops endowments in the beginning stood not in Tythes, but in finable Lands.

FOR it is very certaine, Bishops endowments themselves, in the beginning of the Primitive Church, stood not in Tythes, but in good Temporall and finable Lands, which gracious Princes, and other good benefactors of former Ages bestowed upon them, as it doth appeare out of the first booke of the Code; where sundry Lawes of *Constantine* the great, and other gracious Emperours, even to the time of *Justinian* himselfe are recorded, both for the conferring of Lands upon the Church, and those such as should neither be barren, neither charged with Statute, or other debts of the Exchequer, as also for the conserving

B b

and



*C. de sacrosanct.
Eccles. & de Epis.
& Clericis tot
titul.*

*Authent. multis
magis C. de sa-
cro-sanct. Eccles.*

*Facelin of Fur-
nis in his booke
of British Bi-
shops. Stow fol.
37.*

*Hen. Hunting-
ton lib. 3.*

*Charta regis E-
shelberti, &
charta Will.
prims. Stow
fol. 77.*

Homer, Iliad.

Regum x. c. 14.

and safe keeping of such Lands as were in such sort confer-
red, and bestowed upon them : And it is manifest also out
of our owne stories, both in the *Britans* time, during whose
Raigne there are reported to have beene fifteene Archbi-
shops in the See of *London*, well endowed with possessions,
and if they were Archbishops, then must it necessarily also
follow there were Bishops, for that these are respective
one to the other. The like is written of the *Saxons* Raigne,
under whom the See of *Canterbury*, the See of *London*,
the See of *Rocheſter*, and the See of *Torke*, (for these foure
were first set up againe after the *Saxons* first received the
faith at the Preaching of *Augustine*, *Melitus*, and *Iustus
Paulinus*) are namely reported to have beene enriched
with large Dominions, and Possessions, given to every of
them for their maintenance. And what course hath beene
held with Bishopricks erected since the Conquest, the
ruinated state of them, and others doe shew, amongst
whose ancient livelyhood is not to bee found any indow-
ment by Tythes, but such as of late have come unto their
hands, and that for the most part, by change of their good
finable Lands for impropriate Parsonages. And therefore
much too blame are some of our time, who (when as their
predecessours in former ages never admitted of any im-
propriate Parsonage into their possessions, but onely in
such cases as have beene before remembred) for the name
and place of a Bishop will bee content to make *Glancus*
change with *Diomedes*, that is, give their golden Armour
for the others brazen Armour : or doe like as *Roboam* did,
who in stead of golden shields, that his father *Solomon* did
hang up in the Temple, put in their places shields of brasse:
for the change is no better, and so well know they that
procure the same, otherwise would they never so instantly
desire it.

S E C T. 3.

That the turning of Bishops indowments into tenthes, or Tythes for impropriate Parsonages is unsuteable to the first institution, and very dangerous.

ANd therefore an unsuteable devise was that, and contrary to the course of former Ages, which was procured in the first yeare of the late blessed Queene, (not, as I thinke, by her owne seeking, for shee (good Lady) did in this as shee was directed, but upon some other policie) that it should be lawfull for her to take away so much fineable Land, from any of the Bishops as her pleased, and to give them backe againe in lieu thereof Tenthes, or Parsonages impropriate, which hath patcht them up againe but with unsutable peeces to their coate; whereby they are both brought into obloquie, as though they detained the due provision of the Parochian Church from it, and are set in a way ready to bee overthrowne if every bird have his owne feather againe.

And therefore those good Emperours are most worthy of commendations, that when they had any occasion to make change of Landes with the Church, would still allow them the like in value or better: for a small gain it is unto a Prince for a few thousands of increase of temporarie Benefices unto his Exchequer, to draw a perpetuall losse upon a Church or Bishopricke: for so deere ought the Spirituall State to be unto a Prince (upon whom God hath bestowed so many Kingdomes, and other things of price as hee hath done, and put such an infinite number of people in subjection under his feet) that he would not in any case be hard with God, but thinke every greatest libertie towards God and the Church to be the best.

For certaine it is the Empire and Church doe not much differ the one from the other: for as the Empire doth govern the outward man, and frameth him by outward policie to be a good and loyall subject to the state: So also the

Authent. de non alienand. aut permutand. reb. Eccles. &c. § si minus.

Dic. § si minus Authent. ut supra.

Anno primo
Jacob. Regis.
cap. 3.

Church frameth the inward man by the word of God, and causeth him not onely to bee a dutifull subject unto his Prince, but also to be an acceptable servant unto his Maker: So that there must bee had as well an awfull care of those things that are consecrated to God, as there is a heedfull regard had of those things that belong unto the good of the Common state: for the Church was not made of God for the Common-wealth, but the Common-wealth for the Church. And therefore most gracious hath beene the consideration of our deare Sovereigne, who to stop all importunate suits made to Bishops, for the granting away of any of their revenues to himselfe, or any other, and to meete with the too too easie facilitie of many Bishops, in yeelding unto such suits; of his Christian, and Princely pietie and care, hath made a Law, whereby to protect the Churches possessions from alienation, or diminution, that they may remaine, and continue, according to the true intent of their foundation, to their successours for ever, to the uses and purposes therein limited.

S E C T. 4.

That it had beene a worthy worke in the first Reformers of Religion, if they had returned to every Parish their owne Parsonage; and the dislike that God may seeme to have conceived of that.

BUt here is occasion offered by the example of our gracious King, to wish that such as were authors to the King, for the dissolving of Monasteries, and other houses of Religion, had beene likewise Councillers to him for the restoring of all appropriated Parsonages of Tythes, which were, as it were, in captivitie under those houses of Religion unto their proper Parishes from whence they were taken. Which had beene a memorable worke, and easie to have beene perswaded, the King having so many great mountaines of temporalties, and Seas of goods, and chattels come unto his hand: so that these spiritualities would

would have seemed matter of small account unto him in comparison of those other great riches, & possessions, that came unto him. Which if it had beene done, how blessed a State and Church had this beene, when every congregation should have had a sufficient provision to maintaine a learned Preacher among them: for so was it by the first institution, and so continued, till violence, and superstition changed it. But I feare those men which began this worthy worke, had not such a sincere minde towards Almighty God in this reformation, as they ought to have had, but that they sought therein their owne advancement, more than they did the glory of God; which I doubt me, lest God hath remembred, in some of their posteritie, which being left in great state, have either so vanisht away, as that their place is scarce to be found, or else doe so continue, as that their posteritie ever since hath beene as it were in a minority, so that they are as though they were not, great in place, but small in reputation: yea the three fairest branches, or boughes that ever were in the world, issuing out of that tree, under whose shadow all these things were done, are quite gone, and live by no other posteritie, but by their owne worthy fame & glorious acts, which they did in their life time; which also now being gone, doe follow them, & so shall do unto the worlds end, for they were all three memorable Worthies in their place. So dangerous a thing it is, to mixe our owne ambition, or any other carnall consideration with Gods glory. But, God be thanked, such is the carefull consideration of our most gracious Governour, that now is, in this behalfe, that it may be hoped, that God will remember him, and his posteritie in goodnesse, according to all that good that he hath done for the Church, that he and his posteritie after him, may sit upon his Seat so long as the Sunne and Moone endures: for certainly, his godly and gracious comportment, hath beene such hitherto, as that he may be verily thought to be a man according unto the heart of God, as *David* was. But now to the losse that comes to the Church by these Impropriations.

Whilſt the Parochian Churches ſtood in their eſſentialities, that is, while they did enjoy the naturall endowments due unto their place, that is all manner of Tythes, and other Eccleſiaſticall duties, growing and ariſing within the compaſſe of their Pariſh, due by the word of God, they preached unto their Congregation, they prayed for them, they miniſtered unto them the Sacraments, they kept hoſpitality among their Pariſhioners, and releevd the poore, ſo farre as their portion would reach unto; which was a comely thing to behold, acceptable to God, comfortable to their Pariſhioners, & convenable to their calling: but after the ſame were appropriated to Religious houſes, theſe good courſes were much diſguiſed: for albeit thoſe Religious men, to whom theſe Parochian Churches were annexed, did much pray for theſe Congregations, as they pretended, from whom they had the fat of the benefices, yet they preached little to them, kept ſmall hoſpitality among them, or did any other ſpiritual work belonging to any Paſtorall charge; yet notwithstanding the whole institution, for which Benefices in the beginning were erected, was not altogether extinct in them, but there was ſome outward ſhape or forme of the firſt ordinance left them, ſo farre forth, as that they made continual prayers and interceſſions to God for them: but when it came once into the Laities hands, there was not ſo much as a foot-ſtep left of the firſt institution, for they neither preach unto the people, pray for them, nor keepe any hoſpitalitie among them, but ſpend all the whole revenues of the Church, upon their private uſes, which many times are unfit for ſuch Spirituall proviſion to be ſpent in: ſo that for the benefit of the Church, the returne of them might be well wiſht, albeit in ſo farre as they are perplexed and intricate by the Lawes of this Land, with private mens ſtates, it would be hard to be performed; for the changing of them would be much like, as if a man ſhould move one ſtone in a vaulted work, ſuch as the ſtonie roofes of many Cathedrall Churches and Colledges are, where the taking of one ſtone away is the jeopardie of the whole building: But yet let
thoſe

those to whom this doth appertaine, consider whether in this it were better to please God, than man.

CHAP. IV.

SECT. I.

That Tythes are a Parochian right, and how Parishes in the Christian world, came first to be instituted.

BUt now to returne thither where I left: as every good Bishop, or any of his Clergie, did win any Countie-village, which the Latins call *Pagus*, to the Faith; so they erected up a Church there, and appointed a Pastor or Minister over them, to informe them in the Law of God, and to minister the Sacraments unto them: and set out for his maintenance the Tythe of that Page, or Village, to which he was assigned Pastor: which they did in Tythes, rather than in any other provision, both because it was the Lords inheritance in all ages, and appointed by him for the maintenance of such as served in his Tabernacle, during the dispensation of the mysteries of the Law, and now was returned againe into Gods hand by the expiration of the demise of them, made unto the Levites, during the said time of dispensation; & also because the people would bee more easily induced to part with one part out of every ten, of all the fruites of their grounds, and labours of their hands, unto the Minister, than if there had beene any other regular imposition laid upon them: for certaine it is, Villages and Pages came more hardly and more lately unto the Faith, than great Townes and Cities did; and thereupon grew that name of opposition, which was betweene Christians that dwelt in Cities, and the Infidels that dwelt in Pages, that the one were called Pagans, the other were called Christians, taking their names upon the difference of the places where they dwelt. But from these Pages, (as I have said) came first the use and practice of Tythes in the Christian

Hospinian De origine Monachatu.

*C. Cum contin-
gat de Decim.
verb. de jure
cot. in gloss.*

*Ab ca. nuper de
Decim. & cap
deputati de Fu-
dicis num. 16*

Christian world, insomuch as after when any Law was made, as concerning Tythes, they held them evermore for a Parochian right onely, and in no sort at the disposition of the Bishop, but in such cases as before is rehearsed; insomuch, that if a Bishop challenged any Church in his Diocese, hee challenged it not in respect of any fee simple hee had in it, but in regard of the Spirituall Jurisdiction he had over it. And therefore the Authors of this opinion were farre out of the way, when as they thought the Bishop had like right in the Tythes of a Church of his Patronage, to give and bestow them as hee listeth; as hee hath in his demeanes, and other his Temporall Lands, either to lease them out, or divide them into Tenancies, as him best liketh.

*Ab. cap. ad hoc
De Decimis nu-
mer. 4.*

Neither is that case cleere or without question, whereby they pretend a Bishop being seised in a Manor, may prescribe the Tythes of the demeanes thereof, by an immemoriall prescription for him and his Tenants, and Farmers for yeares, and Tenants at will, to be exonerated, acquitted, and priviledged from all Tythes growing thereupon: which if it be against another person than himselfe, may hap to bee true, although perhaps also that be questionable, for that it is not long since Lay-people were capable of that right; neither could themselves by Law of the Church at any time grant such Spirituall Rights as these are, to a Lay-man, either in *Fendm*, or *Emphiteusim*, without danger of Excommunication, or deposition of their owne place, as hath been before shewed. But if himselfe or his predecessours were Parsons there, either in the right of their Bishoprick, as hath beene of late before remembred, or that the Benefice was annexed unto their See, for the provision of their Table, as many Bishopricks had some one or more Benefices appropriate unto them to this purpose, then could they not prescribe the Tythes in such sort as is pretended: For, albeit no prescription proceedes without possession, yet no man can prescribe against himselfe, although hee be in possession; for that evermore there must be two persons in a prescription, the one which doth prescribe, the other against

ga inst whom it is prescribed; and therefore in these cases it is never said, they hold their Tythes by prescription, but in the right of their Church, or Parsonage. In either of which cases, if they were Lords of the Mannor, and Parsons of the Parsonage together, it is not to bee thought they would so respect the good of their farmer, as that they would either hurt their Church, or prejudice their owne Table, for their Farmers sake: which they must doe, if they suffer a Prescription to runne against the Church, or themselves to exempt the demeanes of the Mannor from payment of Tythes, which were due both to the Church, and themselves: For they were men, that both knew in their conscience, how much they were bound unto the Church in this behalfe: and they were not ignorant what prejudice they should do unto themselves, if by prescription they should yeeld to exempt so necessarie a provision for the maintenance of their Hospitality, as the Tythes of the demeanes of a whole Mannor, and their tenancies are: for no small part of their commendation stood in those dayes in their hospitality, and therefore it is not to be presumed, that they would easily cut off any provision that was fit for the same. Besides, if by either of these two wayes, the Bishop was Parson of the place, then did the fruits of the Benefice, during every Vacation of the Bilhoprick, not come to the King, (as they now doe, whereby the Parsonage & Mannor are both consolidated into one, for that they are now both holden to be Temporalities) but the Parsonages came to the Archbishops of the Province, as a spirituality granted to his See by privilege, during the vacancie of the Sees of such Bishops as were in his Province, as may appeare by the Lord Archbishops Records of *Canterbury*; so that it cannot be thought any prescription could runne in these times, being so often interrupted by vacancies as they were. Which being well considered, the conclusion is very doubtfull, whether ever any prescription ran in this case, neither would it easily bee beleaved by those that know the course of Antiquity, but that there hath a judgement passed in this part; and

*Ex Registro
Archiepiscopi
Cant.*

therefore will I stay my selfe here, and prosecute this point no further.

SECT. 2.

That Tythes of Minerals are due.

*Erastustratist.
de situ Metal-
lorum.*

I Intended to say nothing in this Treatise of the Tythes of Minerals, and other subterraneous bodies, because I know by Law, they are holden by the like right, as the Tythes of those things are, which grow in the upper face of the earth; but yet because I see there is a question made of them, by some that will make every thing controversable, that is due unto the Church, I will satisfie also their curiosity: And therefore, for Mettals, & other substances which are digged out of the bowels of the Earth, & therefore are called *Fossilia*. this is certaine, that what God worketh here in the superficies of the Earth, for those things that spring out of the earth, by the heat of the Sunne, the temperature of the Aire, and the influence of the Celestiall Bodies; the same he effecteth below in the depth of the Earth, for the generation of Mettals, and other subterraneous bodies, by the heat & cold of the Earth, that is included in the bowels thereof: For by the heat, hee raiseth up vapours and exhalations in the matrix thereof, as the matter of those subterraneous bodies: but by the cold, he drieth, thickeneth, hardneth, and indurath the same into a Metall, or Minerall, whereby hee giveth as it were a forme unto it. And as the disposition of every exhalation so compacted and drawne together is finer or grosser, hotter or colder, so is the Metall or Minerall, or other subterraneous body, more noble or more base: yea, somtimes by reason of this diversitie of exhalations and vapours, drawne together at one time, are divers conditions of Mettals there confounded together, whereof some are noble, as Gold, Silver, and Copper: some other are of lesse estimate, as Tin, Lead, and such like. Neither doe these grow onely in the beginning, but they renew againe when they are digged up, (as Trees and plants in the upper face

face of the Earth doe rise out of the roots and stemmes of those trees which have beene cut downe) if the place of their new generation be prepared accordingly: For whereas the place of their generation is farre below in the Earth, Nature, of a certaine modesty in her selfe, will not yeeld to the generation of these subterraneous bodies, but in secret places, far remote from the sight of the Sun, and the privy of other Meteoricall bodies, which are under the firmamēt. And by that meanes it hapneth, that these Minerall bodies are rarely known & perceived to renew againe; for that being once exposed to the light of the Sunne, they are seldome or never closed up againe, by reason of the greatnesse of the gulfes that is made in opening of them. But yet the nature of them is such, that if their bed were thereto prepared accordingly, they would conceive a new: Which is a thing so notorious in Quarries of stone, which are lesse abashed at the sight of the Sunne, and the presence of other Meteoricall bodies in their generation that the Law it selfe, and other good Authors have set it downe for an undoubted experience, that being digged up, they doe renew againe, by the nature & disposition of the mould wherein they are ingendered: for some Earths doe as naturally yeeld stones, and other minerals out of them, as others bring forth Corne, Hay, and other fruits: which if it be true in those bodies which are in the uper crust of the Earth, why not also in those bodies which are found and framed below in the Matrix thereof? And if these bodies doe both ingender and renew, which are conceived so farre below in the Navell of the Earth, why is not Tythe due of them, as well as it is of other fruits that are in the summitie or heighth of the earth? Whether is it, that Gods hand lesse laboreth in the procreation of these subterraneous bodies, than it doth in the ripening and quickning of that fruit, that springs out of the upper face of the Earth? But that is farre otherwise, for here in these upper fruits, one planteth, another watereth, and God onely gives the increase: But in the other Minerall bodies, God alone doth all, for he onely is the planter, hee is

ff. Solutio Matrimonio, l. fructus eos. §. 13. Plin. lib. 36. c. 15. & 18. de naturalis Hist.

Strabo. lib. 5.

the waterer, and he gives the increase alone. Or is it that God hath lesse delight to be honoured with these hid treasures of the earth, than he hath to be worshipped with the labour of the plow, or the increase of the cattell of the field?

But, that this is not soe, it is plaine by the glorious Temple that *Salomon* made, which had not only Cedar trees for the rooffe thereof, and Algummin wood for the ornaments thereof, but also had quarrie stone for the wals thereof, and gold of *Paruaim* for the beautifying of it, and for the overlaying of it within. And of all other kinde of Mettals, Gold is first remembred in the Scripture, immediately after the creation of the world, so that God himselfe may seeme to have a speciall regard of this Mettall above the rest, for that this alone above all the rest, by purifying is not diminished.

Or is it, that God loveth his Ministers lesse than other men, so that hee would have the Laity to have all the precious things of the earth, and his Ministers to have no part of any other thing, but that which is vulgar and common? But how unlike that is, who sees not, when hee seeth that God hath committed unto them, the inestimable treasures of his word, in comparison whereof, both these upper fruits of the earth, and those hid treasures below, are meere drosse and corruption? and therefore it is not like, when he hath committed unto them those great matters, he would deny unto them these smaller blessings. Or is it, that there hath beene paid Tythes of the upper fruit of the earth already, and therefore cannot Tythe be twice demanded of one ground in one yeare, according to a new over-ruled doctrine? But that opinion is both contrary to Law many hundred yeares obtained in the Church without contradiction, whereby it is ordained, that as often as the earth fructifieth in one yeare, so often shall Tythes in the same yeare bee paid of it: and also it is contrary to Divinitie and reason, that it should be otherwise. For when as God hath given thee more Harvest or more Vintages in one yeare, is it not both godly and reasonable, as God hath increased his blessings towards thee, so thou also shouldest rise in thankfulness towards him? For,

where

2. Chron. cap. 2.

Genes. 1. vers.
11. & 12.

Ca. ex parte de
Decimis, & ibi
Ab. 18.

where every one hath received more grace or more favour, there ought he to be more thankfull, lest God for lack of this correspondencie in thankfulnesse, bring thy nine parts, for thine ingratitude towards him, to a tenth onely. For certainly so he is able to doe, by sending deluge and drought upon the earth. by bringing barrennesse upon it, by destroying that which is sprung out of the earth already, by storme and tempest, by the Grasshopper and the Caterpillar: for all this hath hee threatned to all those that are unthankfull this way, neither is the Lords hand more shortned now than it was then. Whereas notwithstanding to the contrary, hee hath promised great kindnesse unto such as shall pay their Tythes truly and cheerfully, as that hee will open the windowes of heaven, and powre out his blessings without measure upon them. *Hilarem enim datorem amat Deus.* Besides this, the earth that bringeth out mettals in the matrix of the earth, is not that that bringeth out corne and grasse in the top of the earth: for that earth that is the mother of mettals, being prest downe farre into the bowels of the earth, can yeeld no sustenance to those fruits that grow so many fathoms above it, to which it conferres nothing save that it doth support and beare up that other earth, which nourisheth the plants and fruits of the upper earth, whose sustenance is not fetch't deep out of the earth, but is suckt out of that earth which is within one cubit, or two of the top of the earth: which may easily be perceived by those fruits and trees that grow upon hard rockes neere to the top of the earth, whose food, although it be neere to the top of the earth yet doe they flourish, and stand fast, as other trees and fruits doe, which have more fat and deepe mould under them. And therefore cannot the Tything of those things which are above, excuse the Tything of the treasures that are below, albeit the conclusion were true, that two things are not to be paid out of one ground in one yeare, for these are not one ground, and the conclusion it selfe is erroneous, and therefore I conclude this point thus: Since Mettals and minerals, and other sub-

terraneous bodies are in no lesse Obligation to God, than other fruits of the earth are, there must be no lesse Tythes paid of them, than are of other fruits of the earth: for that these are the inward fruits of the earth, as well as those are the outward, and therefore of like things, there must be like judgement and like consequence. And thus much as concerning the Tythes of Mettals and Minerals.

S E C T. 3.

That Tythes of Turves be due.

ANd now because I am in this matter of Tythes, I will shape an answer to one doubt that is made, as concerning the Tythes of Turves, that is, of earth disposed, and prepared for fewell, which are said not to be Tytheable, and that upon this reason: That Tythes are not paid of the earth it selfe, but of those things which springe out of the earth, which opinion is true, if it be understood of earth not seperated from the body, and masse of the rest of the earth. For if Tythes should be yearly paid thereof, as it is paid of other things that grow out of the earth, all the whole earth in a short time would become the Clergies. But if it be meant of earth that is severed from the rest of the masse, and globe of the earth, then it is otherwise, For that earth that is thus severed from the other earth, is no more part of that earth from whence it is severed, than a mans hand, or leg being severed from the body, is part of his body after it is cut off from it. And therefore of this earth so provided for fewell, may Tythes as well be paid, as of any other fewell of wood, cole, or otherwise that is provided to be burnt. For there is one reason of things, when they are united together in one body, and another of those things, when they are divided from the same bodie: for so long as they are one and the selfe same body, they follow the nature of the whole, but when they are divided, then is there another consideration of them. *Speratorum enim*

*L. finali. ff. de ca.
luminariis.*

seperata est ratio, & ex seperatis non infertur de uno ad aliud.

Corne,

Corne, Grasse, and such like, while they stand, are not Tytheable, although the Tythe then is in them *pro indiviso*. For while that they stand, they are part of the earth upon which they stand, and therefore so long untytheable, because the earth it selfe is untytheable. But if they be cut downe, then are they to be Tythed, because they are now no longer parts of the earth, but bodies by themselves separated from the earth, so that now the not tything of them is penall: Of which sort are turves separated from the rest of the masse of the earth. Neither is this my opinion alone, but it was *Linwoods* long agoe, and other Ecclesiasticall writers, who not onely make Turfe Tytheable, when it is prepared for fire, but also great rods, and small twigges, stickes, and chips of timber, butts, and roots of trees, thornes, bryers, walnut shels, and nut shels, weeds, coles, and cole brands (called *Titiones*, because they are so burnt as they shall not make a imoake) cowshards, which the Law calls *Editus bonum*. All which a man can use to no other purpose than to burne: for where wood lackes, these succeed in place of wood, and are called by the name of wood, & are in like obligation, as concerning the Tythe due thereout, as wood it selfe is; *Ubiunque enim est eadem ratio, vel eadem equitas, ibi debet esse eadem juris dispositio*. *provincial, de decim. c. sancta, & ibi Linwood verbo turbarum.*

And therefore not in that, that Turves sometimes were gremiall earth, they are to bee discharged of Tythe: but in that they are accounted for Fewell by the law, when they are so prepared to be burnt, they are to pay Tythes in like sort, as other things applyed to that use do. *L. Ligni appellatione §. 4. 5. & 6 ff. delegat. 3.*

S E C T. 4.

That the cognisance of barren heath, and waste grounds belongeth to the Ecclesiasticall Courts, and what every of them are.

AND so farre as concerning the Prohibitions which arise out of this proviso. Now it followeth that I speake something of the next proviso, which is concerning the

2. Ed. 6. c. 13.

the Tythes of barren heath, and waste ground, & the Prohibitions thereupon.

This proviso hath two branches, the one for comparative barren heath, and waste ground, the other for absolute barren heath, and waste, for either of which is assigned a time of seven yeares, either for the paiment of such Tythes, as before the time of their improvement, and converting to arable, they were charged with, or for the free and absolute discharge of them from all manner of Tythes for seven whole yeares next after the improvement ended and determined. For so I take the Statute meant, when as it made the one Tytheable, the other not, for if otherwise they had beene both in one predicament of the barrennesse, the statute had not made the one free from Tythe for so many yeares as it doth, and charged the other all that time with Tythe.

For these two kindes of grounds, although the Statute say nothing, which is comparative barren, which is absolute, yet reason telleth us, that is comparative that hath a positive under it, and a superlative above it: and therefore that is comparative waste, barren, or heath, in respect whereof there is some over ground more or lesse, waste, heath, or barren, so that it hath simply and positively in it some condition of heath, waste, or barren; but if it hath nothing of any of these qualities in it, then is it neither heath, barren, or waste, howsoever long otherwise it hath lien unmanured, and not turned to tillage: For it is not the turning of a ground to tillage that makes it heath, barren, or waste, but it is the ill disposition of the ground it selfe, subject to these inconveniences, that causeth it not to be turned to tillage; for no man will willingly till that, where the gaine of the tillage will not quit the cost and labour of husbandrie, as for the most part it falleth out these grounds that they doe not.

*Glos. L. licet. C.
de locato &
condueto verbo
Resistates.*

Barren ground therefore simply, is that which being eared, yeeldeth not the feede againe, or at the most, yeeldeth so small advantage for the tillage, as that the tenant after

after that he hath paid his Rent, hath not the worth of halfe his seed againe; much like unto the ground whereof the *Glos. L. licet C. de locato & conducto ver- sterilitates.* Scripture speaketh, whose barrennesse is such, as being earred, and sowed, neither the Mower filleth his hand, neither the gleaner his lap with the yeeld thereof. These grounds are not onely called *Sterilia* of the Latines, but also *Infecunda*, *Infrugifera*, & *sine prole*, for the excessive barrennesse that is in them: and the Greeks upon like occasion, terme such conditioned grounds; *ἀγροα, ἀκαρπια, σῆρα, L. si quis usufructuaria, καὶ ἀπορα*, in which sense, mony not put to usury, is *ras. ff. de eo qui pro tutore, Arist. 1. 1. politicorum.* by the Law called barren money, and *Aristotle* calleth it fruitlesse mony: for that mony was not devised thereby to increase mony, as greedy usurers in all ages have done, but that by the means thereof men might ease the difficulties, and necessities of change of one kinde of thing for another, as a horse for an ox, sheep for a goat, iron for brasse, and suchlike: for there is nothing that may not be esteemed *Arist. 4. Ethicorum. c. 1.* by money, and the use of money, is the uttering of money, whereby it is commonly said, money is lost by the use thereof, not that money doth perish or decay by use, for we see the cleane contrary to that, for though money goe thorough a thousand mens hands, yet it is still of the same value, and remaineth in her proper essence or being: but that the use of money is in the laying of it out, and that by the use thereof, mony passeth from him whose it was, and the propertie thereof goeth to another, and therefore as to the first owner it is spent, and lost: without which loosing money naturally gaineth nothing; for lay it up in a coffer or chest never so long, it will never bee the more in number, although perhaps as *St. James* saith, *It will gather a rust and canker, and that rust, and canker will be a witnesse against them that so hoord it up from the service of God, and the Common wealth, in the day of the Lord:* So then, as that money is barren, that lyeth still, and bringeth out nothing, so is that ground barren, that being tilled, yeeldeth no fruit, or at the most, so little as the gaines will not recompence the charge.

D d

Although

Although heath ground, and barren ground be almost Synonymies, yet to speake properly, heath is as it were an effect of barrennesse, for that there is no ground that bringeth forth heath, but for the most part it is barren. And therefore as heath it selfe is an unfruitfull kinde of shrubs, and is good almost for nothing but for the fire; for that neither growing or cut downe, it hath any beneficiall use at all for the common wealth: so also the ground it springeth out of, hath neither fairnesse to the eye, nor goodnesse to the yeeld, but is commonly either a blacke sower ground, that hath no sweetnesse at all in it, or is a drie hungry soyle, such as evermore cryeth give, give, and never restoreth ought againe.

Proverb. 12.

Waste is that which for the unfruitfulnesse thereof hath layne time out of minde unmanured, in which sense it is all one with barren ground; or it is such ground as for the charge of hedging, ditching, fencing, and tilling no man will manure.

Our forefathers anciently comprised all these three under one name, calling them all by the name of *Novalia*, that is, new-broken-up-ground, not onely because they were not broken up in the memory of man before, but also, for that being eared, they yeelded little or no fruit at all: and therefore the interpreters of the Law defining what *Novalia* are, say, that they are such grounds as before the tillage thereof were *inutilia*; and example them out in Mountaines, Marshes, Thickets, and such other unprofitable ground, as out of which before the stocking of them up, and converting them to tillage, the Church took little or no benefit at all. And those are the same or cosen German to those which this Statute calleth heath, barren and waste, for they are one and the very selfe same with them, in all the chiefe points; for which they are excepted out of the Statute.

C. commisum
de decimis ver-
bo inutilia.

So then now, there is no further question what is heath, barren, and waste ground, but who shall try the matter of this quality; whether the Ecclesiastical Jugg, in whose con-
tinuall

tinuall possession this triall hath beene untill now of late, that under colour of this Statute, it hath bin intrenched upon as it may appeare by all the titles of the Ecclesiasticall law, where there is any mention of the Tythes of new broken up ground, and the decrees of the Law-givers in the same, betweene the Monasteries challenging them by grant, and the Parochian Ministers of the Parishes where they grew, claiming the same by right: Or the Temporall Judges whose is the Cognisance of the Tytle, and Tenure of the ground, as also is the setting, letting, buying, selling, and other alienating of the same.

For the point it selfe, the Statute maketh no mention but passeth it over with silence; and therefore it is to bee presumed that it meant, that it should there rest, where it was before the making of the Statute: for the Statute was not made in derogation of the Ecclesiasticall proceedings, that were before; but in affirmance thereof, as the whole drift of the said Statute doth shew.

And if the Statute had meant otherwise, it would surely have expressed it either in the proviso it selfe, or after in the derogatory clause; where it maketh an enumeration of such things as it intended should bee exempted from the tryall of the Ecclesiasticall Law, and by vertue of this Statute, should not bee comprised under the same, among which there is no word of this proviso, or any other in the same Statute before named.

Neither is it unto the purpose, that the Common Law of this Land taketh knowledge of the Tenure and Title of Lands, and such other complements belonging to the same; for these things that are here in question, are no part of those Legall Essences, which the Law requireth to the Tytle and Tenure therof, as is Fee-simple, Fee-taile, and other of like nature, according to the learning of that Law, but these are certaine accidents over and beside the Tenure of the Land which may be present or absent without the injury of the Tytle: as God many times turnes fouds into wilderness, and springs of water againe into drinesse,

and a fruitfull Land makes hee barren for the wickednesse of them that dwell therein, and yet the Tytle or Tenure of the ground is not changed, by these changes of qualities, but remains the selfe same that it was: so that these things are no more subject to the ordering of the Common Law, than it is in the Common Law, to judge and determine what mould is white and what is blacke; what ground will beare wheat, what barley, what oats; for these things are no matters of skill of Law, that they need to be fetcht out of bookes, but they are matters of common experience which every country man can as well skill of, as the greatest Lawyer that is, and therefore the Law in this case is not desirous of any curious prooffe, but contenteth it selfe onely with the depositions of two or three honest men, which speak sensibly and feelingly to the point that is in hand, which is enough to direct any wise Judge in his sentence, so that it needs not these long circumstances of twelve men to teach the Judge what, and how truly the witnesses have deposed. For if every qualitie of the ground resteth in the mouth of twelve men onely, then should no man be able to say out of the mouth of a witness, and pronounce thereupon, this ground is mountaine, this is plaine, this is medow, this is arrable, unlesse he were warranted by the verdict of twelve men thereunto: which if it be an absurditie to hold, then sure it is a like absurdity to say, that barren, and heath, and waste cannot be pronounced without a Jury, for that these things are like obvious to sense, and of like qualitie as the others are.

And I pray you, when they have drawne it unto their tryall, what do they in effect otherwise than the Ecclesiasticall Judge would or should have done, if it had remained still under him? for doe they give credit simply to the conceit of the Jurie, as touching that which hath beene declared, and pleaded in the cause before them, or doe not the Judges themselves rather make a brieve of all that hath beene pleaded in the cause before them, and thereof make as it were a verdict, and put the same in the mouth of the twelve

twelve for their verdict, before they goe from the barre? So that the whole weight of the cause standeth rather in the Judges direction, in such sort as it is in the Ecclesiasticall Law, than it doth in the mouth of the Jurie; for the Jurie men for the most part, are simple people, and scarce foure of the twelve understand their evidence: so that it may seeme rather to be a matter of superfluitie than of good policie, to referre a matter to their verdict, when as they say no other thing, than what the Judge taught them before; *Stultum est enim id facere per plura, quod fieri potest per pauciora*: for albeit perhaps some capricious fellow of the Jurie, upon the confidence of his owne braine, sometimes ita t aside from that which the Judge hath told him, and draw the rest of his fellowes, as so many sheepe after him; yet for the most part the Judges voice is their direction, their loadstone, and the Noth pole to guide them in this businesse.

Besides, in this Proviso, as in some other precedent, there is a great disadvantage offered to the Clergie, which they much complaine of, and that is, that in cases of this nature, they are compelled to suffer triall under them, who are in a manner, parties unto the suit, by reason of the interest they have therein, either in present, or in consequence; so that many now adayes (learning too late by other mens harmes, what the event in their owne cause will be) chuse rather to lose their right, than to venture their cause upon such partiall Judges as the twelve men are.

SECT. 5.

That the Boughes of great Trees are Titheable, and so also are the bodies, but in the case of the Statute onely.

ANd so far as concerning those prohibitions which are forced out of this Statute, for naturally they grow not out thereof: so that I might now passe over to the other branch of my division, that is, of such matters as are now held by the Common Lawyers, to be in a certaine measure

onely of the Ecclesiasticall proceeding, but were anciently wholly of the Ecclesiasticall cognitance, but that the name of the Statute, *De Sylva cadua*, offering it selfe unto mee in the conclusion of this Statute of *Edward* the sixth, gives me occasion to speake something thereof, before I come to the rest.

This Statute, as the words thereof doe shew, was made in behalfe of the Laity against the Clergy, for the exemption of great Woods of twenty yeeres growth and upward, from the payment of Tythes; and that in three cases onely, where the wood was great, when it was xx. yeeres of age and upward, where it was sold to Merchants, either to the profit of the owner himselfe, or in ayde of the King in his warres; so that without these cases, it seemeth the Statute intended no further exemption: for Statutes are things of strict Law, and are no further to bee extended, than the words thereof give matter thereunto, especially when the thing it selfe naturally was liable to ordinary course of the Law, as other things of like nature are, and the Statute comes in derogation of their ordinary course: as in this case, great timber anciently was no lesse tytheable than small trees are, and so by nature ought to be, if the Statute were not to the contrary; yet notwithstanding these limitations of the same, if great wood be cut downe to any other use than to sale, as to build, or to burne to a mans owne use, a prohibition in this case lyeth, and yet is there no Identity of reason to extend it, nor any absurdity would follow, if it were not extended; for here is neither money sought, (which gave occasion unto the Law-givers to make this Statute of exemption) neither is it an unnaturall thing, for to pay tythes of great wood, for before this time they were paid, and by the Law of God, it seemes, they ought to be paid; for that he that is taught, ought to communicate to him that teacheth him in all things: and therefore since the reason that moved the Law-givers to order it so in one case, ceaseth in the other, there is no reason of exemption, and when there is not an Identitie of reason in the things that

that are in demand, there can no sound inference bee brought in from the one to the other, for of severall things, there is a severall reason, and a severall consequence; neither can there be framed thereof a good implication, either positively, or remotively: neither hath this interpretation of theirs any warrant of Law for it, save that it hath been so defined and decided: but what is that to the purpose, if it hath been wrested and wronged contrary to the true sense of the statute, and that by those that take benefit thereby, whose partiality being taken away. the thing it selfe would easily turne againe to his owne nature, and right would take place?

The reason they yeeld for the exemption of great woods of the ages aforelaid, although to themselves it be plausible yet to others it is strange, as namely, that great Trees are part of the Free-hold, and that men use not to pay Tythes of their free-hold, but of those things which spring out of their free-hold, as out of Corne, Grasse, Fruit, and such other; whereas indeed the tallest Timber tree, that is, if it were as high as the highest Cedar in *Lebanon*, is no more part of the inheritance or free-hold, than the lowest bramble that groweth in the field; for they are both equally part of the ground wherein they grow, and do take alike nourishment and sustenance from the same; neither doe they differ in that they are trees the one from the other, *secundum magis & minus*, as the Logicians say; but in that, the one is a great tree, and the other a smal shrub: and the cause of this provision here in *England* for these great trees, was not for that one was more of the inheritance than the other. but for that the one yeeldeth more profit to the commonwealth than the other, and therefore they have made the cutting downe of the one, more penall than the other: as in like case by the Civile Law, whosoever privily cutteth downe, or barketh a Vine, an Olive, or a Fig tree, or doth any other unlawfull act, whereby any fruitfull tree, or any Timber tree, doth perish and decay, it is Theft; and it is punished in the double value of the hurt which is done, and if

Plowd. in So-
by contra Mo-
lyns.

ff. Arborum
furtim casa-
rum, tota tit.

he.

he be Tenant to the ground which hath done this villanie, he loseth his hold, which commeth not of that, that one kinde of Tree hath more state in the ground than an other hath, but that the Law hath respected, the necessary use of the one more than the other.

L. Ligni appellatione de Leg. 3. et L. Carbo-num ff. de verò. significat.

L. Ligni appellatione. Of fili-us, & idem ff. delegat. 3.

By the Civile Law, although this word, Wood, be general, yet it is thus distinguished, that some is wood, some is Timber, which the Law calles *Materia*. Timber is that which is fit to build or underprop withall: Wood is whatsoever is provided for fewell, so that under that name there passeth Reed, Cole, Turfe, Cow-dung, and whatsoever is any where ordinarily used for fewell. Timber is of a higher consideration than wood is, insomuch as if a man bequeath unto another all his wood that is in grove-field, there shall not passe by this legacie, such Trees as are cut down for Timber: but if they were dorrer Trees, or the owner thereof purposed them for fewell, and so cut them out into billet, or fagot, in such sort, as there could bee no other use thereof than to burne, then it is otherwise: for by this meanes, of great wood, it is become small wood, as being cut out into shides or splinters, fit for to burne. So that in the reckoning of the Civile Law, Timber stands not onely in the nature of the wood it selfe, but is in the destination and purpose of the owner, who according to his good liking may make that wood, which is fit for Timber firewood, or Timber: which if it were so in account with the great Lawyers of this Land, the Church should have more Tithes of wood appointed for fewell, and lesse suit for the same.

2. l. wood, ut sup.

As they exempt the bodies of great Trees above xx. yeares growth, from payment of Tythes, so also they free the boughes thereof, upon this reason, that the boughes thereof are fit and serviceable for building, which although happily may be in some of them that are next to the Trunk of the tree, yet it is farre otherwise in those that are more remote from the same, whereof there can be no other use than to burne: and therefore the Law precisely holds, in case

case where wood is bequeathed, by which is meant fire-wood onely, unlesse the Testator otherwise expresse his minde, the lops of timber trees, which the Law calls *Super-amenta materialium* are bequeathed, for that the lops have not that use that the Timber hath, that is, to build or prop up withall, but they serve to burne onely: By which severall ends, there is severall consideration and account made of them. Neither is it to the purpose that they alledge for the defence hereof, that the accessorie followeth the nature of the principall, for that rule is not true in every accessory, but onely in such, wherein is the like reason as in the principall, which in the trunk and lop of a tree cannot bee alike for building.

*L. Ligni appella-
at S. Otilius de
Leg. & Fod. 3.*

*L. Et si. C. de
Prædiis mino-
rum.*

Further, how the Boughes of a tree that are of the same substance, as the body of the tree is, should be accessories to the tree, I see not, for nothing can be an accessory to another that is of the same nature and substance as the other is; as the legge, or hand, are no accessaries to the body, for that the leg or hand are of the same substance that the bodie is: The child, neither while it is in the Mothers womb, neither after it is borne, is an accessorie to the Mother, for while it is in the mothers wombe, it is part of the wombe, and after it is severed from her wombe, it is a man or woman like principall as her selfe is: But that which is an accessory to another, must be of another nature than the principall is; so in naturall living creatures, haire, hooves, hornes, and finnes, and such other like excrements, are accessories to the creature whose they are, for that they are of a farre different nature from the bodies, out of which they come: and so in other naturall things not living, as the Earth it selfe is, the Trees, Grasse, and fruit, that spring out of the same, are accessories thereto. Further, in civile matters, expences and executions are accessories to the causes out of which they rise: and in Marriages, Dowries, and Joyntures, are accounted accessories to them, for that without Mariage, neither Joynture nor Dowrie can stand. Usurie is said to be an accessorie to the principall, not in respect that the proper subject of either of them is money,

*L. 1. ff. de vcn-
tre inspici-
endo.*

*L. dotis ff. de
jure dotium.*

and so there is one substance and nature of them both, but in regard of the dependencie the one hath to the other; for he that will make challenge to Usury, must first prove there is a principall. But for the better clearing of these matters of accessory and principall, wee must know that in bodies whose substance is all one. There are some parts like, which the Philosophers call *partes similes*; some other unlike, being likewise called of them *partes dissimiles*, which in no sort are accessories one to another, but make one continued body of both, which the Law calls *ἁπλοῦς*: Similar parts are such, as have one substance, forme, and figure, as the trunke or body of a tree is all one in inward essence, and outward shape: Dissimilar parts are those, which have one inward nature with the other, but are divers in outward shew, as the boughes and roots of the Tree are divers between themselves, and different from the body, and yet all agree in one substance, and have all the general name of Wood, whereby they are discharged from being accessories the one to the other, and yet they are not under one capacitee or service, or one comprehension of Law, because they are unlike one to the other; and of unlike things, there is unlike reason, and unlike consequence.

Now upon these grounds to exempt Timber trees wholly from the service of him, that is Lord as well of the tall woods, as of the low shrubs, is very hard, for though himselfe dwells not in houses that are made with mans hand, nor hath any need of tall Trees to repaire his Tabernacle, or prop up his dwelling: yet since he hath left such behinde him, as have charge of his flocke, and feed them in word and worke untill he come, and they dwell in earthly habitations, as other men doe, and their edifices and buildings have need of repaire, in like sort as other mortall mens houses have, being all in like manner subject to rottenesse and corruption; great reason it had beene to have allowed him some proportion of these great woods, towards his servants necessary uses, during the time of their service here; and if not in the very tenth it selfe, yet in the

xxx. xl. or l, part of the same, that God thereby might have beene as well acknowledged to be the Lord of the great Oakes of the Forrest, and that by him they have their length, breadth, and thicknesse, as he is accepted and reputed to be Lord of the small brambles and bushes of the field: for as now the case standeth, God may eyther seeme to have forgot himself, that he hath not made timber trees tytheable, as he hath done other smaller woods, especially having such occasion to use them, both in the Chancels of Churches that are dedicated to his uses, and also in the buildings and repairings of his Ministers houses, who supply his roome in their severall Congregations, untill he returne to Judgement; or that may well be objected against us, in allowing such things for Tythes as us please, and disallowing the rest, as was by that ancient Father of the Church *Tertullian*, objected against the Senate of *Rome*. who being intreated by the Emperour *Tyberius* (for the strange wonders and myracles he heard to be wrought by our Saviour *Jesus Christ*) that he might be entertained among the number of their Gods, refused so to doe, for that they heard that our Saviour was a Jealous God, and did in no sort admit the society and fellowship of other Gods; which this grave Father hearing, (although many yeares after) said merrily, although wisely; That God should be God, if Man would let him.

And thus far of those causes which are held to be absolutely of the Ecclesiasticall cognizance, and yet notwithstanding are eclipsed by interposition of sundry contrary matters.

CHAP. VII.

SECT. I.

In what cases Diffamatorie words belong to the Ecclesiastical, and what to the common Law.



Now as concerning those things which have beene accounted but in a certaine measure of the Ecclesiasticall cognizance, and yet notwithstanding have anciently, in a manner, been tried wholly at the Ecclesiasticall Courts, such as are matters of Diffamation, and matters of Bastardie, both which now a dayes are much challenged by the Temporall Courts, to be of their cognisance. But here first of Diffamation, then of Bastardie.

*Bartoll. turpia
ff. delegat. 3.*

To diffame therefore is, as *Bartol* saith, to utter reprochfull speeches of another, with an intent to raise up an ill fame of him; and therefore himselfe expresseth the act it selfe in these words, *Diffamare, est in mala fama ponere.*

Albeit Diffamations properly consist in words, yet may they also be done by writing, as by Diffamatory Libels, and also by deeds, as by signes and gestures of reproach; for these no lesse shew the malicious minde of the Diffamer, than words doe.

*Linwood c. auctoritate verb.
quicunque de
causain glos. de
sent. excom.*

Diffamatory words are uttered either in some scoffing or jesting manner, so as facete and merry men use to doe, to make the company merry wherein they are; or they are spoken by some that have some weaknesse, or distemperature in their brain, either by drink, phrensie, or other lightnesse, or by any rashnesse in their tongue: or they are poured out upon some rancor and malice, by some that envie another, with intent to diffame him, and spread abroad a matter of disgrace upon him.

*Arist. 4. Ethic.
cap. ante penult.*

If they be spoken in a jesting manner, to make the company merry, if it bee in a fine sort delivered, it is by the Greeks called *εὐτραπιλία*, and is by *Aristotle* held to be a vertue

vertue, although by St. *Paul* it is condemned as a vice; *Ephes. 4. 5.* but if it be in a homely and base sort deliveted, then is it accounted to bee a kinde of rudenesse or rusticitie; but *Extra de pre-* whether way soever they be uttered, there is, for the most *sumpt. c. 1.* part, no advantage taken against them, unlesse thereby there follow any discredit to the party, upon whom such jests are broken, for then are they not without blame, *Noxius enim ludus est in vitio*, neither can that bee called a jest or sport, whereby a mans good name is hurt, or any crime imposed upon him. *ff. adl. Aquiliani, nam ludus.*

The like may be said of those which speak hardly of any by the lubricity of their tongue, or weaknesse of their brain, who for that they are not thought to speak such words maliciously, passe for the most part unpunished, *Lubricum enim lingua non facile ad poenam trahendum est*, no though a man in this case speak ill of the Prince himselfe: And the Civile Law is so farre from taking hold of such words in these cases, that the Emperour himselfe hath said of them thus: *Si id ex levitate processerit, contemnendum est; si ex insania, C. Si quis Imperatori male-* *miseratione dignissimum est.* *dicere.*

But if the cause of such words be rankor or malice, then are they altogether to be punished, for that there can be no just excuse made for them.

Such diffamatory words as proceed of malice, imply eyther matters of crime, or matters of defect. *Bohic. cap. Si culpa de injuriis.*

Such as imply matters of Crime, either are such crimes which it is expedient for the Common-wealth to know, as Treason, Felonie, Murther, Incest, Adultery, and such like, to the end they may receive due punishment, whereby God may be pleased, and the Common-wealth satisfied: Or they are such crimes or faults, which it is not expedient for the Common-wealth to be acquainted with; as where one calleth one prodigall, or spend-thrift: For albeit it be expedient for the Common-wealth, that no man mispend his estate, for that the Common-wealth hath as it were an interest in every private Subjects state, yet this is rather his owne hurt, than any other mans, and that which hee *Linwood provinc. de sent. excomm. c. 1. verb. malitiose.* *Bohic. ubi supr.*

spends away unthriftilly, commonly turnes to another better subjectsgaine, whereby the Common-wealth is relieved in one, that it lost in another; and for the most part there is no great corruption of manners in the example thereof.

*Term 12 Hen.
7. fol. 22. Re-
gist. pag. 49.*

A great while it was before the Lawes of this Land tooke knowledge of Diffamations, as counting them things belonging to the Spirituall Law, so they were duly prosecuted, as may appeare by certaine Judgements and consultations which have issued out thereon: but now let men prosecute them never so duly, yet Prohibitions goe out on them duely, and sundry others are drawne to the common Law Courts by action of the case; wherein they have so infranchised themselves, as that they take upon them to confine the Ecclesiasticall Law how farre it shall goe therein. Which limitations notwithstanding, as farre as I can conceive, are but distinctions without differences, and so are in very deed but bare *Synonemies*, that is, diverse names expressing one thing: for all the words in the said limitation, inferre no more than this, that Ecclesiasticall men are not to deale in matters of Diffamation, but where the matter of Diffamation is onely Ecclesiasticall; and yet I reverence the Authour thereof as a great man, and of like excellencie in this Law, as *Papinian* was in the other Law, and this I thinke to bee commendation enough, for never any Lawyer in former age had more commendation, or eulogie of wit than himselfe had.

*C. ad L. Iuliam
repetundarum.
l. 1. § 2.*

*ff. de aqua plu-
arcenda. l. 1. §
denique.*

In the first of these cases, if a man proceed by ordinary course of Law, either for the punishment of the sinne, as by presenting the offender to the Ordinary, or indicting him before the Temporall Judg. or by admonishing him by any charitable denunciation, with purpose to amend him, and to recall him from such offensive wayes as hee is charged to walke in, Or do any thing in Judgment for the defence of his owne cause, as in objecting something against the partie himselfe, or his witnesses, either for the eleva-
ting

ting, or discrediting of the truth of the cause, or the testimony of the witnesses; there can be no advantage taken against him for he cannot be said to defame, which useth the liberty the Law gives him: albeit in this case some advise that a man shall object none of these matters against another in judgement, but when his cause necessarily requires such things to be spoken of for the defence thereof, and that the party that objecteth them doth protest hee doth it not with a calumnious minde, but that the defence of his cause otherwise would not be justified.

But if any man doe any of these things maliciously, with purpose rather to utter his owne cankered stomacke, than that hee would benefit the Common wealth thereby, then is he punishable: for although it be behoofe full for the Common wealth that bad mens faults should be manifested, that so wickednesse may bee punished, yet is it not fit they should be uttered in reproach and choller.

Of the second sort, although there be some that contain petty crimes, yet are they many times so frivolous, as that they yeeld no action: for frivolous and small things the Law regardeth not.

For such Diffamations as arise upon defects, if the defects be such that the contagion thereof is to be feared, unlesse the people be forwarned of the danger that may ensue thereon, as in cases of Leprosie, the Plague, the French Pox, and other like infectious diseases, and that it bee revealed with a sincere minde, rather to cause men to refrain their company for feare of the infection, than of any malicious humors against the party, thereby to reproach him, it is no Diffamation. But if it be uttered in any spleene or choller against the party defective, then is it actionable; for it is an uncivile part to lay open another mans defects: but if the defects bee such as it nothing availeth the Common-wealth they should be knowne; as where a man objecteth against another any imperfection of his minde, or deformitie of his body which he had from his cradle, or hath happened to him by any accident without any default of his,

L. Proculus & l. fluminum in fin. ff. de damno 12 secto. ff. de regul. juris. l. factum S. non videtur.

L. Labeo de suppell. legat. C. defamosis libel. l. 1. ff. ad l. Aquileam l. si ita vulneratus.

C. quando ex quib. quarta par. l. 2. lib. 10.

his, and cannot be easily remedied; or reproacheth him with any thing in his state or condition, wherewith hee is not justly to be charged, neither is there any just cause offered the diffamer why he should use such disgracefull speeches against the other, then is it altogether punishable: For that such things tend onely to contumely and despite, which the law seeketh by all meanes to repress, for that thereby charity betweene man and man is violated, and the peace of the Common-wealth is many times broken and disturbed.

The proceeding in these causes in the Civile Law was of two sorts: for it was either *ad publicam vindictam*, or else, *ad privatum interesse*, as the partie injured made his choice thereof.

ff. ad L. Cornelianam l. in constitutionibus S. ult.

Ad publicam vindictam, was when the party Diffamed, sought to have the Diffamer recant his words, or to undergoe some open and infamous punishment for his rash and malicious speeches, whereby it might be publicly knowne abroad that he did the other wrong.

ff. de verborum obligation l. stipulationum S. plane. ff. de re iudicat. l. si quis ab alio.

But *Ad privatum interesse*, was when he sought not the recalling of the slanderous speeches which were given out against him, but esteemed his credit at some great rate (as that he would not for a thousand pounds; or more or lesse quantitie, according as the worth and calling of the person is, have had such speeches gone out of him) and so seekes to have his credit salved by recompence in money, as the Judge or Jurie, upon prooffe of his worth and place, shall esteeme it, and take it. In these actions, hee that sued *ad publicam vindictam*, and had followed so farre, as that he had brought it to a Recantation or a publike disgrace, could not have recompence of his credit by money, save onely in case of commutation: neither he that had got his credit valued by money, could have a publique disgrace also inflicted for his satisfaction, but what way hee had chosen, with that he must have rested contented, for that irefull mens wraths otherwise would never have beene satisfied, & the prosecution of these actions otherwise would be confounded.

These

These two kindes of proceedings the Princes and Sages of former ages seeme to have sorted to the two kindes of Jurisdiction that are amongst us, the one Spirituall, the other Temporall: and therefore the Law of the Land it selfe saith, in a cause of Diffamation, when money is not demanded, but a thing done for punishment of sinne, which is all one, as when the Civilians say, when it is done *ad publicam vindictam*, it shall be tried in the Spirituall Courts: whereupon by argument of contrary sense it followeth, that where the punishment of sinne is not required, but amends in money is demanded, there it is to be tried in the Temporall Court, for the Law would that every man should have his remedie agreeable to reason in what sort him best liketh. And therefore be the fault what it may be, that the words of the Diffamation do sound unto, as long as it stands but in words, and the party doth not take upon him to justifie the matter that is comprised under those words, and doth seek but for the punishment of the slanderous words onely, so long it is to be tried at the Spirituall Law; for the Law speaketh in generall cases of Diffamation, where punishment of sinne onely is required: so that where a man is called Traitor, Felon, or Murtherer, or any other crime belonging unto the Common Law, being every one of them words of great diffamation, so the partie therein seeke punishment onely, and not his private interest, there the Spirituall Law is to hold a plea thereof. For where the Law doth not distinguish, there neyther ought we to distinguish: but the Law hath said in generall, that causes of Diffamation, whose prosecution is thus qualified, doe belong unto the triall of the Spirituall Law: and therefore even those cases before remembred where the party followeth this kinde of prosecutions, ought by that Law to belong unto the Spirituall Court, as on the contrary side, Spirituall causes of Diffamation being propounded to a pecuniary end ought to be ordered in a Temporall Court.

But where any man takes upon him to justifie the crime
 Ff that

2. Edw. 3. c. 11.

that he hath objected, there either Court is to hold plea of the crime that properly belongeth to that Court, for that now words are no longer in question, but matter is in tryall, whether the party diffamed hath indeed committed that offence that he is charged withall or no; which can be tryed in no other Court, than in that to which it doth properly appertaine. And that this was the course anciently held in matters of Diffamation between the Ecclesiasticall and Common Law, it is manifest by the Statute of 2. Edward the 3. chapter 11. where although the Statute taxeth the perverse dealing of such, who when they had been indicted before the Sheriffs in their Returne, and after delivered by Inquest before the Justice of the Assise, did sue the indictors in the Spirituall Court, surmising against them that they had diffamed them, and therefore in that case forbad the like suits; for that justice thereby was hindered, and many people were feared to indict Offenders: yet that Statute plainly sheweth that in all other cases of Diffamation rising out of Temporall crimes beside this, the Ecclesiasticall Law had the cognifance: and that this was forbidden, it was not for that words of this nature, could not be censured at the Ecclesiasticall Law, when punishment of sin only is required, but for that it was not fit that those things, which had beene once ordered in one Court, should be called againe to examination in another: and therefore the generall proceeding in matters of Diffamation, is not there prohibited, but the particular crossing of matters after judgement is there reprehended.

So that the distinction whereof I formerly spake, which taketh upon it to determine when a case of Diffamation is of the Temporal cognifance, and when of the Ecclesiasticall, cannot here take place: for that it is contrary to the former Statute or Decree that divided these cases into Temporall or Ecclesiasticall cognifance by the varietie of the prosecution thereof, and that it is contrary to the ancient practise that hath confirmed this prosecution in either Court.

Court, but especially in the Ecclesiasticall Court, which hath still holden the triall of such Diffamations, wherein sin hath been onely sought to be punished, untill now of late, that men have stept over the banks of their authority, and confounded either Jurisdiction with the promiscuous acts one of another; when as the Statute it selfe is plaine, that the Authors of this Statute or Decree, whether-soever you call it, which set these bounds to either Law, in proceeding upon matters of Diffamation, respected not so much the quality of the crime, upon which the Diffamation grew, as the manner of proceeding therein, ayming in the one at publike vendict, which is to be sought out of the Ecclesiasticall Law, and in the other at private interest, which is to be had out of the Temporall Law.

Neither is an Action of Diffamation, a matter of so light esteeme or quality, (a mans fame or good name being in equall ballance with his life) as that it should be drawne away to be attendant on any other action that is of smaller weight or importance than it selfe is: for this is one of those Actions which for the speciall preheminance thereof, are called *Actiones prejudiciales*, that is, such that draw smaller causes unto them, but themselves are drawne of none other, but such as are like principall, or greater than themselves are. So that unlesse the manner of proceeding bring these causes under the compasse of the Common Law, in such sort as I have before shewed, the coupling of them with another matter of the same Law, will hardly bring them under the triall thereof: for that there be few actions greater than it selfe is, so that if the crime be Ecclesiasticall, howsoever it toucheth a temporall cause, the tryall shall be still at the Ecclesiasticall Law. And the same that I say of Diffamations rising out of Ecclesiasticall crimes, I hold also to be true in Diffamations springing out of Temporall crimes, where punishment is required for the offence committed and amends in money is not demanded, unlesse happily that grow of penance injoynd, which the offender will redeeme by giving money to the Judge, or to the party

grieved. And this I take to be a farre better limitation for either Law, having the ground of the Civile Law, and a statute of the Common Law, and common reason it selfe for it, than the other devise is, which so distinguisheth this businesse, as still it makes it rest in the mouth of the Judge, which cause of Diffamation is meere spirituall, and which not, which were not to be done if there were cleere dealing in the matter: for Lawes are so to bee made, as that as little as may be, be left to the discretion of the Judge, but all be expressed as farre as the nature of the cause will give leave: which albeit it be hard to doe, for the variety of the cases that every day happen, never thought on before, yet that is to be laboured to farre as may be; for this liberty of leaving many things to the Judges discretion, is many times great occasion of confusion in Judicature, saying sometimes this, and sometimes that, as his private humour shall lead him: and therefor a plaine distinction betweene both the Lawes were best, that every man may see, and say, what is proper to either of them.

SECT. 2.

That the suit of Bastardy, as well in the principall as in the incident belongs unto the Ecclesiasticall Law.

ANd thus farre as concerning matters of Diffamation. Now followeth that I speake of matters of Bastardie.

Bastardy is an unlawfull state of birth, disabled by divine and humane Lawes to succeed in inheritance.

Of Bastards some are begot and borne of single women, (in which rank also I put widowes) some other of married women.

Of single women, some are such as a man may make his wife if himselfe be sole and unmarried, as those that are kept as Concubines in place of a mans wife; some other are such as a man cannot make his wife, although himselfe be sole, and unmarried, for that either they are already pre-
contract.

contracted to some other; or that they be in so neere a degree of affinity or consanguinity one to the other; that the marriage would be damnable, and the issue thereof unlawful.

Of such as are begotten of single women, by single men, who are in case to marry them if they will, some are called by the Civile Law *Filii Naturales*, because they were begot by such as they held for their wives, and yet were not their wives, who might be legitimate by sundry wayes, as hereafter shall be shewed.

Some other begot of single women, if they were begot in vage lust, without any purpose to hold such a one for a Concubine, but upon a desire onely to satisfie a mans present lust, whether they were begotten by married men or single men, were called *Spurii*, who for the most part are putative children, and their father is not otherwise knowne than by the mothers confession, which sometimes saith true, sometimes otherwise. *Isidore* saith, they were so called because they were borne out of purity, for that such kinde of lust is contrary to holy Matrimony, whose bed is undefiled, and therefore the other is corrupt, and abominable.

But where any was borne of a woman single or married, that prostituted her selfe to every mans pleasure, and made publike profession of her selfe to be an harlot, (such as they are whom the Law calleth *Scorta*) these were called *Manzeres*.

Those which were begotten of married women were called *Nothi*, because they seemed to be his children whom the mariage doth shew, but are not, no otherwise than some feavers are called *Nothæ*, that is, bastard feavers, because they imitate the tertian or quartan feaver in heat, and other accidents, but yet are neither tertians nor quartans, as the learned Physitians well know: but these are counted so to be bastard, if either the husband were so long absent from his wife, as by no possibility of Nature the child could be his; or that the Adulterer and Adulteresse were so known to keepe company together, as that by just account of time,

it could not fall out to be any other mans childe but the Adulterers himselfe; and yet in these very cases within this Realme, unlesse the husband be all the time of the impossibility beyond the Seas, the Rule of the Law holds true, *Pater is est quem nuptia demonstrant.*

The most nefarious and last kinde of Bastards, are they whom the Law calleth *Incestuosi*, which are begot between Ascendents and Descendents *in infinitum*, and betwene Collaterals, so farre as the Divine Prohibition and the right interpretation there of doth stretch it selfe.

The effects of these sorts of Bastardies are divers.

Heb. 13. 4.

First, it staineth the bloud, for that he that is a Bastard can neither challenge Honour nor Armes from the Father or Mother, for that he was begot and borne out of Matrimony, which is the first step to honour: and therefore the Apostle calleth marriage honourable, whereupon it must follow, that the opposite thereof is shame; for, albeit it be no sinne for a Bastard to be a bastard, yet is it a defect in him to be such a one, and a thing easily subject to reproach.

Secondly, it repelleth him that is a Bastard, from all succession, descending from the Father or the Mother, whether it be in Goods or Lands, unlesse there be some other collaterall provision made for the same: for that all such Lawes and Statutes as are made to any of these purposes, were intended to the benefit of such as are legitimate, and are next of kin by lawfull succession, and not by unlawfull conjunction.

To legitimate him that was a Bastard, when there could no claime be made unto his birth-right but by grace, among the *Romans* were sundry wayes; first where the Father of the Bastard (they being both single persons) married the woman, by whom he begot the child; secondly, where the Father did by his last Will and Testament, or by some publicke instrument subscribed by witnesse, name him to be his naturall and lawfull sonne, or simply his sonne, without the addition of any of these two words, base, or naturall, and therewithall did make him his heire, which could not be, but

but in such cases onely, where the father had no other naturall and lawfull childe left alive.

Thirdly, whereas the Prince by his Rescript, or the Senate by their Decree, did do any one that credit as to grant them the favour of legitimization, which was done for the most part, in such cases onely, where either the Father of the childe, or the childe himselfe, offered himselfe to be attendant on the Court or Prince.

In this Realme, none of the foresaid legitimization take place, as farre as I can learne, but onely that which is done by Parliament, and that very rarely; for besides those that King Henry the eight did in the variety and mutability of his minde, towards his owne issue, I thinke there cannot be many examples shewed: for, as for that which is wrought by subsequent Marriage, being a thing anciently pressed by the Clergy of this Land, to be admitted in like sort, as it is used in other Lands, where the Ecclesiasticall Law taketh place; it was rejected by the Earles and Barons with one voyce, and answer was made, that they would not change the Lawes of the Realme in that point, which to that time had beene used and approved. All these cases of Bastardy in other Lands whether they be such, or not such, are triable by the Ecclesiasticall Law: But here with us it is questionable, to what Law, and how farre they doe appertain, whether to the Ecclesiasticall or Temporall.

For the matter of Bastardy, what it is, the Ecclesiasticall Law, and the Temporall differ not; but there is a diversity between them in the prosecution thereof, for the Ecclesiasticall Law bringeth it two wayes in Judgement; the one incidently, the other principally; but the Common Law maketh two sorts thereof, the one generall, the other speciall: But first of the Ecclesiasticall division, then of the Temporall.

Bastardy is then said to be incidently propounded, when it is laid in barre of some other thing, that is principally commenced; as when one sueth for an inheritance that he pretendeth is due unto him by his nativity, another crosseth

seth him therein, by objecting against him bastardie, with purpose to exclude him from his action in the inheritance: here the barre is in the incident, because it comes exclusively to the action of inheritance, but the action for the inheritance it selfe was in the principall, for that it was begun in consideration of the inheritance, and not with intent to prove him selfe legitimate; which happely hee never dreamed of, when he first entered his action for the inheritance. In which case, he which is charged with the bastardy, may require him selfe to be admitted to prove him selfe legitimate before the Ecclesiasticall Judge, and to be pronounced to be such a one. *Ad Curiam enim Regiam non pertinet agnoscere de Bastardia:* Against which the Law of the Land doth not oppose it selfe, but acknowledge it to be the right of the Church. And yet to avoid all subtill and surreptitious dealing in this behalfe, it hath set downe a wary and cautelous kinde of proceeding, by which the same shall be brought unto the Ordinary, and such as have interest in the suit may have notice thereof, and time to object in forme of Law against the proofes and witnesses of him that pretends him selfe to be *Mulier*, if they so thinke good: and what shall be certified herein by the Ordinary, as concerning the Nativity of him that is burthened to be a Bastard, (that is, whether hee were borne before or after his Parents marriage) shall be supplied in the Kings Court, eyther by judging for, or against the inheritance.

Glanvill lib. 7.
cap. 13.

2. Hen. 6: c. 11.

Glanvill lib. 7.
cap. 15.

But Bastardy is then taken to be principally proponned, when eyther one finding him selfe to be greeved with some malicious speech of his adversary, reproaching him with Bastardy, or him selfe fearing to be impeached in his good name, or right, doth take a course to cleere his nativity, by calling into the Law, him or them by whom hee is reproached, or feareth to be impeached in his right and credit, to see him, to prove him selfe legitimate, and to alledg and object against it, if they ought have, or can have to the contrary: which if either they doe not, or doing to the utmost what they can, can bring no good matter against his proofe,

prooffe, but that it stands still good and effectuell in Law, to all intents and purposes whatsoever (although perhaps hereby hee shall not be able to carry the inheritance, both for that it appertaineth not to the Ecclesiasticall Law, to judge of Lands, Tenements, or Heriditaments; and also for that there is a precise forme set downe by Statute, how suits of this nature shall be recovered) yet if no opposite or contradicter appeare herein, and the suit was onely taken in hand against such, as either openly reproached him, or secretly buzzed abroad slanderous speeches, as concerning his legitimation: it is not to be doubted, but by an accident also it wilbe good for the inheritance it selfe, for where a mans legitimation is sufficiently proved, thereon followeth 9. Hen. 6. c. 11. all things which naturally thereto belong. But if any man urge the forme of the Statute, being interested therein, then must it necessarily be followed, for that otherwise it would be thought, all that was done before, so farre as it may concerne the inheritance, although it were but in a consequence, were done by collusion. This kinde of proceeding hath been much more in use in former times than it is now, and never any opposition made against it: but now it goeth not altogether cleere without contradiction, as many other things are offensively taken, which notwithstanding have good ground, and sufficient warrant for them.

And so farre as concerning the Ecclesiasticall proceedings in this businesse: Now to the Temporall sorts of them.

Generall Bastardie is so called, because it comes in incidently, and is in grosse objected against some that sue in a matter principall, to disappoint his suit. This suit, because it is of the Ecclesiasticall cognisance, it is sent by the Kings writ to the Ordinary, with certaine additions for more perspicuity of the inquiry thereof; as that whether he that is charged with the Bastardie, were borne in lawfull Matrimony, or out of Matrimony, or whether he were born before his Father and Mother were lawfully contracted together in Matrimony, or after. All which the Ordinary makes inquiry upon by his owne Ordinary and pastorall authori-

*Lib. Intrac.
fol. 75.*

tic ; for that matters of Bastardy doe originally belong to the Ecclesiasticall Court, and not to the Temporall, and as hee findes the truth of the matter by due examination to be this, or that, so hee pronounceth for the same in his owne Consistory, and makes certificate thereupon to the Kings Court accordingly ; and as he pronounceth, so the Temporall Judges follow his sentence in their judgments, either for, or against the Inheritance that is in question.

Bracton.

Speciall Bastardy they say is that, where the Matrimony is confessed, but the priority or posteriority of the Nativity of him whose birth is in question, is controverted ; which to my thinking, if I conceive aright, is no other thing than the generall bastardy, transported in words, but agreeing in substance and matter with the other : for even these things which they pretend, make speciall Bastardie, are parts and members of the generall Bastardie, and are either confessed or inquired upon, by vertue of the Kings writ in the same : For first for the Matrimony that is here mentioned, it is there agnised both by the Plaintiffe in pleading of it, and the Defendant in the answering thereto, and therefore the Plaintiffes plea is thus ; Thou art a Bastard, for that thou wast borne before thy parents were lawfully contracted together in Marriage, or before their Marriage was solemnized in the face of the Church : To which the Defendants reply is, I am no Bastard, for that I was borne in lawfull Matrimony, or that I was borne after that my Father and Mother were lawfully married together : In both which you see, there is a Marriage confessed, and the question onely is of the priority or posteriority of the nativity of him that is charged withall, whether it happened before, or after his parents marriage, which, as they hold, is the other member of speciall Bastardie : and yet this priority or posteriority of nativitie, by vertue of the Kings writ, comes no lesse in inquiry to the Ordinarie in the case of the generall Bastardy, than they make it to be traversable in the speciall Bastardie ; and therefore the writ

to

to the Ordinary for generall Bastardy, is conceived in this manner; viz. *Inquiratis utrum prædictus A. pars rea, Lib. Intrac. genitus vel natus fuit ante Matrimonium contractum fol. 35. inter talem patrem suum, & talem Matrem suam: vel post. Glanvill lib. 7. cap. 15.* So that either they must confesse there is no such bastardie as they make shew there is, diverse from that that is tried before the Ecclesiasticall Judge, or that themselves doe confound the members that should divide the same, and make them one or the other, as them list; for both simply they cannot be, unlesse they be distinguished with other notes and differences, than hitherto I finde they are. But to say the truth, if these things bee well weighed and considered, speciall Bastardy is nothing else, but the definition of the generall, and the generall againe is nothing but the definite of the speciall: for whosoever is borne out of, or before lawfull Matrimony, hee is a Bastard, and he againe is a Bastard that is borne before, or out of lawfull Matrimony, so that these things to be a Bastard, and to be borne out of lawfull Matrimony are convertible one with the other: so then as it were hard to make a divorce betweene these things that are so neere in nature one to the other, being convertible termes one to the other; so hard againe it were in policy to dis-joyne these things in triall, that are so neere in affinitie one to the other, because they are the same in substance and nature as the other are, and therefore *Eodem jure censi debent; And also, ne continentia causarum dividantur, 12. q. c. 2. cogit novimus.* which is no lesse absurdity in Law, than it is grossenesse in other learning, to deny a principle, or generall Maxime of the profession.

And so farre hitherto as concerning the reasons and arguments, that may be brought against this speciall Bastardy. Now it resteth that I shew by ancient presidents, that both these sorts of Bastardy have appertained to the Ecclesiasticall Courts onely, and the first president is in the incident the other in the principall: and the president is no lesse ancient than Henry the seconds time, as that which happened

ned under *Alexander* the third, about the yeare of our Lord
1160. and the case is this.

*Cap. Lacor.
ext. qui filii
sunt legitimi.*

A certain man of *Normich* Diocesse called *R. H.* had issue
J. H. who had a son called *C. H.* *J. H.* deceasing before *R. H.*
his Father, *C. H.* succeeded in his Grandfathers inheri-
tance, his said Grandfather being dead; but *M. H.* Brother
to the said Grandfather, pretending that the said *I. H.* was a
Bastard, draweth the said *C. H.* into the Temporall Court
upon che Inheritance; whereupon *C. H.* calleth the said *M.*
H. into the Bishop of *Normich* his Court, for the triall of
his nativity; but the Bishop long protracting the cause, *C.*
H. appealed to the Pope, who delegated the same cause to
the Bishop of *Excester*, and the Abbot of *Hereford*, with
order, That if the said *M. H.* should not within 2. moneths,
prove that which he objected against *C. H.* that then they
should intimate the same to the secular Judg. before whom
the inheritance was in question, that he should not stay any
longer upon the question of legitimation, but proceed to
judgment in the cause of the inheritance. Which president,
though it belong before the Statute of Bastardy, made by
Henry the 6. and so no writ went from the Temporall
Court, for the certificate thereof: yet it shewes, that the
Temporall Judges in those dayes did not proceed to judg-
ment in the principall cause, before the incident were deci-
ded by the Ordinarie; and that they counted Bastardy then
to be of the Ecclesiasticall cognisance; and that it was law-
full for him that was pretended to be a Bastard, to appeale
from his Ordinarie, if either the Ordinary detracted the
determination thereof, or were suspected of partiality.

And thus farre of the incident. There is another much
like president to this in the same Kings dayes, but that is in
the principall, for that the inheritance came not first in que-
stion, but the legitimation it selfe, and the case is as follow-
eth. A certain man called *Ralph*, kept one *Analine*, the wife
of one *Atin*, by whom he was supposed to have begot one
Agatha, who also being married, had a sonne called *Rich-*
ard: *Ralph* going beyond the Sea, left *Richard* and his
Mother

*Cap. Causam:
ext. qui filii
sunt legitimi.*

Mother *Agatha* in possession of all his goods and lands; but newes being after brought that the said *Ralph* was dead beyond the Sea, *Francis* the Brother of the said *Ralph*, spoyled the said *Richard* of the possession of all the goods and lands he had of the said *Ralph* his Grandfather, for that he did pretend the said *Agatha* his Niece, and Mother of the said *Richard* was not borne of lawfull Matrimony, so that neither shee her selfe, nor her sonne ought to succeed the Brother of the said *Francis*, but that the inheritance thereof did belong unto himselfe: whereupon the said *Richard* being thus spoyled by *Francis* his great uncle, obtained Letters of restitution to the Bishop of *London*, the B. of *Worcester*, and the B. of *Excester*, under this form: That before they entred into the principall cause, which was this, Whether the said *Agatha* were born in lawfull Matrimony, or not, they should restore the said *Richard* to his grandfathers inheritance. But the Bishop of *Rome*, after understanding by the said Delegates, that the plea of inheritance within this Realme, did not belong unto the Church, but unto the King, recall'd that part of his rescript, which concerned the restitution of the said *Richard* to his inheritance, and gave order to the foresaid Bishops, to proceed in the cause of legitimation; willing them to inquire, whether the said *Agatha* were born of the said *Aneline* in the lifetime of her husband *Allin*, and when shee dwelt and cohabited with him, as with her husband; or whether the said *Ralph*, Father of the said *Agatha*, kept the said *Aneline* openly & publikely, while the said *Alin* yet lived; And if they found it to be so, then they should prononnce her the said *Agatha* to be a Bastard, for that *Aneline* her Mother could not be counted to bee a wife, but a whore, which defiling her husbands bed, presumed to keepe company with another, her husband yet being alive: But if they found it otherwise, then they should prouounce her, the said *Agatha* to be legitimate. All which was done after the death of the said *Ralph* and *Aneline*, as the Decretall it selfe shewes: Neither was there any authority that opposed it selfe

selfe against that proceeding, but held it to be good and lawfull, though it were in terms of speciall Bastardie, for then that which they now call speciall Bastardie, was not borne. Besides hereby it appeareth, that the Ordinaries then did not onely proceed in cases of Bastardy incidently, that is, when a suit was before begun in the Common Law, upon a triall of inheritance, and that by writ from the Temporall Courts, but even originally, and that to prepare way unto inheritance, or any other good that was like to accrue unto a man by succession, or to avoid any inconvenience that might keepe him from promotion, as may appeare by this practise following.

*Constit. Otto.
innotuit de
uxoratis à be-
neficiis amo-
vendis.*

Priests in the beginning of the Raigne of *Henry the 3.* yet married secretly, and their children were counted capable of all inheritance, and other benefits that might grow unto them by lawfull marriage, so that they were able to prove that their parents were lawfully married together by witnesses, or instruments: which many children did, either upon hope of some preferment, that by succession or otherwise was like to come unto them, or to avoid some inconvenience that otherwise might light upon them for the want of that prooffe, some their parents yet living, or their parents being dead, and the proceedings before the Ordinary was holden good, to all intents and purposes, even in the Common Law, for otherwise they would not have so frequented it: for as yet there was made no positive Law against marriages of Priests, and Ministers, but the Church of Rome then plotting against it, (for that by that they pretended the cure of Soules was neglected, and the substance of the Church wasted and dissipated.) did by *Otho* then Legate à *Latere* to *Gregory* the ninth order by a Constitution, that all such Ministers as were married, should bee expelled from their Benefices, and their Wives and Children should bee excluded from all such livelihood, as the Fathers had got during the time of the Marriage, either by themselves, or by any middle person, and that the same should become due unto the Church,

Church, wherein they did reside, and that their children from that time forth should be disabled to enjoy holy orders, unlesse they were otherwise favourably dispensed withall; which constitution althougħ it wrought to that effect, to barre Priests for that time of their Marriage, untill the light of the Gospell burst out, and shewed that that doctrine was erroneous, yet to all other effects, the proceeding in the case of Bastardy stood good as a thing due to be done by holy Church. And therefore *Linwood* comming long after, in his *Carologue* that hee maketh of Ecclesiasticall causes, reciteth Legitimation for one among the rest, for that in those dayes there was no dispute or practise to the contrary.

And thus farre as concerning those things wherein the Ecclesiasticall Lawes are hindered by the Temporall in their proceedings contrary to Law, Statute, and custome anciently observed, which was the third part of my generall division. Now it followeth that I shew wherein the Ecclesiasticall Law may be relieved, and so both the Lawes know their owne bounds, and not one to over-bear the other as they doe at this day, to the great vexation of the subject, and the intolerable confusion of them both, which is the last part of this Treatise.



PART. IV.

CHAP. I.

SECT. I.

The meanes how to relieve the Civile Law: that they are of two sorts: that two things are required to the first meane, and that the former of these is the right interpretation of Lawes, and what that is.

HHe meanes therefore to relieve the profession of the Civile Law are two. The first is, by the restoring of those things which have been taken powerfully by the Common-Law taken from them, and the bringing of them backe againe unto their old and wonted course: The other is by allowing them the practise of such things as are grievances in the Commonwealth, and fit to be reformed by some Court, but yet are by no home-Law provided for.

The first of these stands in two things, whereof the one is the right interpretation of the Lawes, Statutes and customs which are written, and devised in the behalfe of the Ecclesiasticall Law. The other consisteth in the correcting and supplying of such Lawes and Statutes that are eyther superfluous, or defective in the penning, made in the behalfe (as it is pretended) of the Ecclesiasticall profession, but yet by reason of the unperfect penning thereof, are construed for the most part against them.

The right interpretation of the Law, Statutes, and Customs, pertaining to the practise, standeth as is pretended in the Judges mouth, who notwithstanding hath that authority from the Sovereigne, and that not to judge according as him best liketh, but according as the right of the cause doth require.

The

The supply or reforming of that which is over, plus, or defective, is in the Parliament, so notwithstanding as that the Prince evermore breatheth life into that which is done.

Lawes, Statutes, or Customes, are then best interpreted when as the very plaine and naturall sense of them is sought after, and no forraine or strained exposition is mixt with them, for that turneth justice into worne-wood, and judgement into gall: then that the Judge be not too subtil in his interpretation, but follow such exposition of the Lawes, as men of former ages have used to make, if they be not plainly absurd, and erroneous, for oft shifting of interpretations breedeth great variance in mens states, among such as have busie heads, and much discrediteth the Law it selfe as though there were no certainty in it: with which although the sage Judges of our time cannot be charged, for ought that I know, (yet I cannot tell how) men much complaine that Lawes are farre otherwise construed in these dayes, than they were in former ages: which as it is an ordinary complaint in the Temporall Courts, so it is not without cause, much lamented at the Spirituall Court, where the interpretation upon the three Statutes of Tythes made by King *Henry* the eight, and *Edward* his sonne, among other inconstancies of other Lawes, hath such great varietie of sense and understanding in sundry points thereof, as that if the makers thereof were now alive, and the first expostors thereof sate in place of judgement againe (the Statutes being measured by the interpretation they now make of them) would hardly acknowledge them either to be the Statutes that they then made, or the other did after expound, and declare: for every of these Statutes and the sense that was given of them, was wholly for the benefit of the Church, according to the tenor thereof, but as they now receive explication, they are not onely not beneficiall to the Church, but the greatest hinderance to the same that may be; for the words are made to jarre with the sense, and the sense with the words, neither is there kept any right analogie in them: and therefore the Reve:

Lib. 1. Politic.

and Judges are to be intreated (because they challenge unto themselves the opening of the Statutes alone, albeit peradventure that be yet *sub iudice*, where the Statute of Ecclesiasticall causes are to bee interpreted) that they would recall such exorbitant interpretations, as have of late gone abroad upon these Statutes, and restore them to their ancient sense and understanding. No man can so cunningly cloake an interpretation, but another will be as cunning as he to spie it out, and then the discredit will bee the Lawes.

A small error (saith Aristotle) in the beginning, is a great one in the end, and he that goeth out of the way a little, the longer he goeth on, the further he is off from the place his voyage was to: and therefore the speedier return into the way againe is best. The old Proverb is: He that goeth plainly goeth surely, which may be best verified in the exposition of the Law, if any where else; for commonly men offend no where more dangerously than under the authoritie of the Law, and therefore one saith very well, that There are two faults required in a Judge, the one of knowledge, whereby he may have skill to judge uprightly; the other of conscience, whereby he may be willing to judge according to that as his skill leadeth him unto both which being in the grave Judges, is not to be doubted, but they will be easily induced to review their owne, and their predecessors interpretations, and reduce such exorbitant expositions as have escaped out thereof unto the right and naturall sense thereof: which if perhaps they shall be loath to doe, for because it makes for them, or for some other like partiall respect, then humble supplication is to be made unto his Majestie, that he himselfe will be pleased to give the right sense of those things which are in controversie betweene both the Jurisdictions: for his Majestie by communicating his authoritie to his Judges to expound his Lawes, doth not thereby abdicate the same from himselfe, but that hee may assume it againe unto him, when and as often as hee pleaseth. Whose interpretation in that is to bee preferred before theirs, first for that his interpretation is impartiall.

as he that will not weaken his left side to make strong his right (for so are these jurisdictions as they are referred unto his politique body) but will afford them equall grace, and favour, that he may have like use of them both, either in forraigne or domesticall businesse, as occasion shall serve: then that his Judges interpretation maketh right onely to them betweene whom the cause is, but his highnesse exposition is a Law unto all, from which it is not lawfull for any subject to recede, neither is it reverfable by any, but by himselfe, upon a second cogitation; or him that hath like authority as himselfe hath: and therefore most fit to be interposed betweene Jurisdiction and Jurisdiction, that the one party be not Judge against the other in his own cause, which is both absurd and dangerous.

L. 1. num. 8. C. de legibus.

L. 1. num. 7. C. cod. l. omnes

populi ff. de ju-

ris. & jure.

And let this suffice for the right interpretation of Lawes and Statutes: Now it followeth that I speake something of the supplies that may be made of the defects that are in the same.

SECT. 2.

The second thing required to the first correcting of superstition, and supplying of defective Statutes.

IT is not to be doubted, but it was the full minde and intent of the Lawmakers, which made these three Statutes to incoffe the Ecclesiasticall Courts in the inheritance of all those causes that are comprised in those Statutes, save those that are by speciall name exempted, and that they did by the said Statute, as it were deliver unto them full and quiet possession of the same, for even so sundry branches of the said Statute do shew, as I have elsewhere made it manifest: and that there hath growne question upon many points thereof, and that the professors of the Ecclesiasticall Law have beene interrupted in the quiet possession thereof, commeth of the unperfect penning of the same, and not of any just title or claime that may be made by the professors of the other Law thereunto: but this is a thing

not onely proper to these three Statutes, but also common to all other Statutes which are writ of any Ecclesiasticall causes within this Land; which notwithstanding may be remedied, if it seeme good unto his sacred Majesty and the rest of the wisdom of the land assembled together at any time for the making of wholsome Lawes, and the reforming of the same, by supply of a few words in some places, or periods that are defective, and yet keeping the true meaning and sense of the same.

As for example in the Statute of the two and thirtieth of *Henry* the eight, in the S. wherefore, neere the beginning of the same Statute, the Statute ordering, that all persons of this Realme, and other of the Kings Dominions shall truly, and effectually set out, and pay all and singular Tythes, according to the lawfull customes and usages of the Parishes where they grow, and become due; because there is a question made where these customes and usages shall betried, in the Ecclesiasticall or Temporall Law; if these or the like words had beene added to the same (to be proved before an Ecclesiasticall Judge after the form of the Ecclesiasticall Law, and not elsewhere) the whole matter had been cleare for that point.

And whereas againe in the end of the same Statute, there be some good words tending to the appropriating of these matters of Tythes, and obligations, and other Ecclesiasticall duties to the Ecclesiasticall Court: and that the remedy for them shall be had in the Spirituall Court according to the ordinance of the first part of that Act, and not otherwise: yet because there is no penalty to that act, busie men easily make a breach thereinto, for that Lawes without penalties, for the most part are weak and of no force: if therefore this or the like supply were made (if any man sue for these, or like duties in any other Court, than in the Kings Ecclesiasticall Court, the parties so suing, to forfeit the treble value of that which he sued for, to be recovered in the Kings Ecclesiasticall Court, where it ought to have bin commenced, by the way of Libels, or Articles, the one halfe thereof shall be

be to the King, the other to the party grieved) many of these suits would easily be met withall. Neither is it to the purpose that this is matter of mony, and Lay-fee that should be in this sort forfeited, and therefore is not regularly to be sued for in the Ecclesiasticall Court; for seeing the cause is Ecclesiasticall, upon which the matter of forfeiture ariseth, it may be very well allowed, *Ne continentie causarum dividantur*: and for that ordinarily every jurisdiction that is wronged may defend it selfe with a penalty: beside, we doe by the like right in the Ecclesiasticall Courts, recover expences of suits in Law, fees of Advocates, and Proctors, and mony for redemption of sin, so that it will be no strange matter to have this kind of suit allowed unto the Ecclesiasticall Court.

Further, whereas there are in the Statute of *Edward* the sixth, chapter 13. in the beginning almost of the said Statute two clauses under paine of forfeiture, one of treble value, for Tythes carried away before they were divided, set out, or agreed for: The other of double value where the Tythes were hurt or impaired by the party stopping or letting him that had interest thereunto to carry them away, or by withdrawing, or carrying them away himself; & the same is ordered by a clause in the second branch thereof reaching unto them both (for that a clause put in the end of two sentences, stretcheth it selfe indifferently unto them both, if there be no more reason it should belong to the one than the other, as there is not in this case, for if it were not so, the first penalty had no order set down, how it might be recovered) that the same shalbe recovered according to the Kings Ecclesiasticall Law: to which if there were added this word [only] and not elsewhere, or otherwise, & they martialled in their right places, there were nothing more sure or strong.

Moreover, whereas in the first prov. so of that Statute it is decreed, that none shall be compelled to pay any manner of Tythes for any Heriditaments, which by the Lawes or Statutes of the Realme, or by any Priviledge, Prescription, or Composition Reall, are not chargeable therewithall; whereby it is doubtfull in what Court the said Exempti-

ons are to be alledged: if there were inserted these words, or other of like nature [the said Laws, Statutes, Priviledges, Prescriptions, or Compositions real to be alledged, argued, traversed, and determined before the Ecclesiasticall Judge onely according to the forme of the Ecclesiasticall Lawes, and not else where] upon like forfeiture of treble dammages, as is aforesaid, it would make this point sure unto the Ecclesiasticall Law.

Over and besides this, whereas in the same Statute there is a discharge allowed to barren, heath, and waste ground, in some for not payment of tythes, in other for the manner of payment of them for the space of 7. yeares, after the improving and converting of them into arrable ground or meadow; it would make the matter plaine, which Law should have the pronouncing thereupon, if there were added these or the like words [So the same ground be proved in forme of Law in the Ecclesiasticall Court, to be barren, heath, and waste.]

Lastly, whereas in the said Statute, among other limitations of causes, wherein the Ecclesiasticall Judge is not to deale by vertue of the said Statute, there is one in these words, neere the end of the said Statute [Ne in any matter whereof the Kings Court ought of right to have jurisdiction] which limitation is so vage & large, that thereout there may be forged as many divers kindes of Prohibitions, as the Poets fained *Vulcan* ever made thunderbolts for *Jupiter*. And therefore it were very well and consonant to the good meaning of the said Statute, that this vageness were restrained and reduced to a more certainty of matter, by these or like words. [By any ancient Law or Statute of this Land.]

And so farre as concerning the imperfection of the said three Statutes, and how they may be amended and made reducible to the first meaning and intent of the makers thereof, by some small supply, alteration, or change of words, the sense and ground-work standing ever the same, according to the wisdom of his Majestie, and his great Councell assembled in Parliament.

CHAP. II.

SECT. I.

The second Meane to relieue the Civile Law, which is, by allowing it the practice of such things as are greivances in the Common-wealth, and fit to bee reformed by some Court, but yet are not otherwise provided for: and first of the greivances which concerne Parents and Children, and how they may be relieved.

Now it followeth, that I shew wherein the practice of the Ecclesiasticall Law (under which I comprise the Civile Law, so farre as it is in use amongst us) may be increased to the benefite of the subject, and the enlargement of the profession, without the prejudice of the Common Law. And that I may first begin with the piety of Fathers towards their children, and children again towards their Parents, which is the beginning of all Common-wealths; for even Nature it selfe hath taught that not only in the most brutish people that bee, but also settled it in the savagest kinde of beasts that are upon the earth, the one to cherish that which it selfe hath brought out, and the other to love againe that which hath brought it out: and yet, what Law is herein *England*, which provideth for the one or the other, unlesse it be the Statute of the xliij. of *Elizabeth*? and that is but for poore folkes children onely (where otherwise they should be a burthen to the Parish) but for the Parents themselves, or other children that are cast off, either by the negligence or the unnaturalnesse of the one toward the other, there is no provision at all. Yet by the Civile Law there is a purveyance made, whereby both the father is compelled to acknowledge his childe, (if there be any variance between the husband and the wife upon jealousy or suspicion of Adulterie, if the same cannot be proved by the womans owne confession, by witnesses, by the

*ff. de agnos-
cend. & alien-
dis liberis vel
parentib. c. de
alendis liberis
vel parentib.*

*ff. de ventre in-
spiciendo. cu-
stodiendoq;
partu.
ff. de officio
proconsulis, l.
nequicquam S.
de plano.*

the act it selfe, or some other violent presumption) and to nourish and maintaine the same, but if the fault appeare against her, and it be so sentenced by the Judg, then may he as well refuse the one as the other: but for other children upon whom there is no such doubt, the Parents may bee constrained to maintain, clothe, and feed them, and to fet them out a portion of their goods, so that either the State and faculty of the Parents will beare it, or the children have not deserved to the contrary, wherefore they should not in that sort be provided for. And as the Father in this sort is bound unto the Childe; so the Childe againe is obliged unto his Parents to provide for their sustenance, so farre forth as their ability will reach unto: for it is very unnaturall, that the Parents should want, so long as the children have meanes to relieve them. In both which cases, if either the Parents refuse to admit of their children, or the children againe refuse to yeeld comfort unto their Parents, the Judge may interpose his authority, and injoyne each to maintaine other according to their ability, and as to his discretion shall seem meet, which if any of them should deny to yeeld unto, the Judge may, by distresse of their goods taken and sold to the value thereof, compell them to performe his order: and yet that onely in case of Maintenance, and not to discharge debts, wherein either of them stand bound unto their creditors.

A man here in *England* dying, and leaving his wife Executrix, she after marrying, carrieth away all his state unto her second husband, who gives and spends thereof, as him listeth, without any regard of the children of the first husband, (by whom all, or most of those goods came) inso-much, as many times those children when they come to age, and are to goe abroad into the world, they have nothing to begin the world withall, whereby many of them come to beggery, and others to more fearfull ends (for necessitie, as the Proverb hath it, is a hard weapon) neither is there any meanes in this Common-wealth to relieve this mischiefe, for ought I can learne: but by the Civile Law

Law there is very good remedy ; for by that Law, neither the woman surviving her husband, neither the man surviving his wife, having issue betweene them during the matrimony, have the property of those goods, which either of them brought one to the other, and are left behinde by the defunct ; but the property is the childrens of the deceased, and the use or benefit his or hers onely which doth survive, during his or her naturall life : which course if it were taken here in *England*, many poore fatherlesse & motherlesse Children, would be in better state than they are ; for then howsoever their present estate were hard, yet their future would be better, when they should be secured to enjoy their fathers or mothers right : neither could such men or women which marry, or are married with persons of this sort, much complaine if this Law were established here, for so should they have, though not a perpetuity in another mans state, yet a long and beneficiall fruition thereof, even so long as the party in whom they were interessd did live : but for the returne thereof unto the right owners, the Law is so scrupulous, that if the husband or wife doe remarrie, it will have him that is to marry the widow, bound with good sureties for due restitution of the defuncts part, unto the children of the former marriage.

*C. De secundis
nuptiis tot. tit.*

SECT. 2.

The greivances which arise by Executors, and how they may be releevd.

ANother inconvenience there is in Executors in this Land, Cosen german to the former, which goeth altogether uncontrouled, whereby I ghesse there is no Law in this Land to correct it : and that is, the trifling of Executors in paying of Legacies and bequests, under pretence of debts unknowne, which they make shew they must provide for, upon danger of their own indemnity ; whereby many Legacies are never paid, but stand, as it were, suspended untill the day of doome. Against this abuse, the Civile Law hath

L. 1. §. 1. 2. & 3. ff. ut Legatorum nomine caveatur. two remedies: One by exacting bond of the Executor, that he shall pay the Legacies without fraud or deceit, according to the wil of the defunct; the other, that if he refuse so to do then the Judge may put the patty complainant in the possession of that which is demanded: for it is not enough for the Heire or Executor to pretend a debt, to the end that hee may stay the Legacies, which the Testator hath given, in his hand, but he must make plain and manifest unto the Judge, that there is such a debt owing, and that the suit thereupon is either already begun, or very like to be begun in very short time, without fraud or collusion, otherwise many of those pretences and threats may be vaine and elusory. And in case there be any such just cause of feare in deed, or there be any such suit in truth commenced upon the same, the Executor may secure himselfe by bond or surety from the Legatory, that in case the debt be evicted of him, he shall repay to the Executor what he hath received: wherein, although it may be said, it is safer for the Executor to secure himself by keeping the Legacy still in his hand, than to trust upon suerty or other caution, for that these provisions many times are frail; yet since this kind of dealing is injurious to the Legatory, & the with-holding thereof, for the most part hath no honest defence, but is grounded upon deceit and covetousnesse, it were behoovefull for the common-wealth, that such ill dealing were redressed: for so mens Wils, which are their last Ordinances, (than the which Princes have granted no greater benefit to men, than that in their life time they may dispose how their goods shall be bestowed after their death) shall have that end that the Testators themselves intended: which if they had known in their life time, their Executors would not have performed, they would never have put them in trust as they did. Besides, hereby the names of Executors which now are charged with manifold imputations, by the ill dealing of some, shall by this meanes be unburdened & restored unto their former credit, which was, to discharge the trust that by the defunct was reposed upon them: for the Will of the defunct cannot bee defrauded without great sin.

L. hæc autem ff. si cui plus quam per Legem falsidiam. ff. de regulis juris L. vani timoris.

L. Nisi si dolo S. si Legatus ff. si cui plus quam per legem falsidiam licuerit.

ff. Si quis omi- sa causa testa- men. L. nam fa- cit totum, l. 4. ff. de heredi- d. b. insti- tuend l. pater- familias. S. 1.

An.

Another mischief there is in Executors and Administrators, not only uncontrollable by the Law of this Land, but rather allowed & justified by it; and that is, when they have once got the authority into their hands, and priced all at the lowest rate, they will sell away all at the highest price they can, & answer the poore Children, & Legatories, for whose good they were appointed Executors, at the value in the Inventory onely, contrary to all right and reason: for by the Law, an Executor is to sell nothing of those things which are left unto the Children, or Legatories, but such things onely, which by keeping cannot be kept, or which being kept, will be chargeable to the inheritance: or otherwise the Testator were so indebted, that his estate must needs be sold, for the satisfying of the Creditors: or lastly, that he himselfe ordered by his Will something should bee sold. But for such things as may be kept, and by keeping will not be the worse, he ought precisely to preserve them, specially where the Testator hath bequeathed any thing in kind. And if he sell ought of those things which he ought not to sell, he may not sell it but by the decree of the Iudg. interposed upon the same, & upon just cause proved before him: wherein if it appeare after, the Iudg. was abused, by any false allegation and corrupt testimony, the sale is void, and the Minor, when he comes to his full age, or within 5. yeres after, may reverse or recover that which is thus sold by collusion, out of the hands of him, to whom it was sold, as being done against the authority of the Law. And that it may be better understood, how precise the Law is in this point, and what things it alloweth may be sold without the decree of the Iudg. and what not, I will set down the words of the Law it selfe, speaking of Tutors and Governors of Puppes; whose place Executors & Administrators do supply, so far forth as they have the tuition & governance of Minors, during their under-age, faithfully translated. And it is a law of *Constantine* the great, reproving a former law of *Severus* the Emperor, which give leave to Tutors and Curators to sell away all the gold, silver, precious stone, apparell, & other rich moveables,

*ff. de reb. corum
qui sub tutela
sunt sine de-
creto non alie-
nandis vel ob-
ligandis. tot. tit.
& ibi Bartol.
in rubrica.*

*C. de admini-
strat. tutorum,
vel curatorum.
lex que,*

ables the Testator had, and to bring the same into money, which turned greatly to the hinderance of many Orphans: whereupon *Constantine*, after he had first ordered that nothing should be sold of the pearle, precious stone, naperie, utensels of the house & other necessary stuffe & ornaments of the same, saith thus. Neither shall it be lawfull for them, (meaning the Tutors or Curators) to sell the house wherein the Father died, and the childe grew up, wherein it is woe enough to the childe not to see his ancestors images not fastened up, or else pull'd down. Therefore let the house, and all other his moveable goods still remaine in the Patrimony of the childe, neither let any edifices or buildings, which came in good reparatiō with the inheritance, ruine or decay by collusion of the Tutor: but rather of the Father, or he whosoever the minor was heir unto, lest any building in decay, let the Tutor both by the Testimony of the worke it selfe, and the faith of many be compelled to repaire it: for so the yearely rent will bring in more profit to the Minor, than the price of the things being deceitfully sold under-foot, will doe the Minor any good. Neither doth this Law onely make provision against Tutors, but also against immodest & intemperate women, which many times gage unto their new married husbands, not only their owne state, but even the state and lives of their children. Further, it crosseth the course of putting the childrens money to usury (notwithstanding anciently it was thought, therein consisted all the strength of the Patrimony) for that course is seldome long, scarcely continuall and stable, and that thereby many times the money being lost, the childrens state comes to nothing: and therefore his conclusion is, The Tutor should sell nothing, without the order of the Iudge, saving the Testators over-worne apparell, or those things, which by keeping could not be kept from corruption, and such cattell as were superfluous. Whereby it appeareth, how carefull that age was, not to give way to Executors by sale of the Testators goods, to make gaine of the Orphans; neither is this age better than that; but that which was feared then, may bee provi-

provided for now, by like authority as was then.

In this Land a man dying, leaving Legacies to his children, and his wife Executrix, or dying intestate, and she taking administration, and in her second marriage bringing all her first husbands state, and her childrens portions unto her second husband, and then dying, there is no remedy against the second husband, to recover the said Legacies or portions due unto the children out of his hands, because he is neither Executor nor Administrator, and that he came not to those goods by wrong, but by the delivery of the Executrix, with whom he married: but yet by the Civile Law there is, and that by this claime, that the said goods came unto his hands, & that it is no reason, any should be made rich by my goods against my wil: for Legataries have no action against any, as Administrators in their own wrong, or hinderers of the performance of the last Will of the deceased, but Executors onely, and they then alone, when the party having it, holds it by wrong, and not by lawfull delivery, which in this case is otherwise.

L. si et me ff. de rebus creditis si certum petatur.

By the Law of this Land, there is no provision to preserve the state of a prodigall person from spoile, which neither hath regard of time, nor end of spending, unlesse the Father provide for this mischief in his Will, or by some other good order in his life, but he is suffered to waste and spend his goods untill there be nothing left (as though the Prince and Common-wealth had no interest in such a subject, to see hee did not waste his state, and abuse his goods) whereby many great houses are overthrowne, and many children whom the Fathers carefully provided for, never leaving raking and scraping all their life time, that their children after them might live in great plentie and abundance, come to great shame and beggery. But the Civile Law hath remedy for it: for the Law counting such a man that is in this sort impotent in his deeds, howsoever he be otherwise sensible in his words, to be halfe mad, and to be a young man in his manners, how oldsoever otherwise he be in his yeares sets a Curator over them for the preserving and well ordering

ff. de curatoribus furioso, et aliis extra minores dandis.

of their state, no otherwise than if they were children, or mad men indeed, who so long have power over them, and their goods, untill they come to sane manners, to which if they once returne, the Curators office ceaseth.

*Uter mulieri. ff.
eod.*

The like they do to a widow or sole woman which liveth riotously, having neither regard of her fame, nor of her state.

I finde an old practise anciently used in the Ecclesiasticall Courts, for restraining Executors or Administrators for dealing covenantously in an Executorship or Administration, when there are more Executors named in a Will, than one, or more Administrators deputed by the Ordinary in an Administration than one, which were well if it were recalled, and brought backe to his former use againe. For now, as things stand many times one capricious fellow named an Executor in a Will, or appointed Administrator by the Ordinary with some other well-meaning men, getting a start in this businesse of the rest, ingrosseth all into his owne hands, and without privity, or concurrence of the other, selleth, releaseth, and disposeth all at his owne pleasure, contrary to the minde either of the Testator, or the Ordinary, who would not have named so many in the Will, or Administration, but to the intent that all might or should execute and administer, and one communicate their acts with another. The contrary whereof is many times very prejudiciall and hurtfull, to those that are to take benefit by the said Will or Administration, who for the want of the due performance of this kinde of proceeding, are defrauded of all that which in right or reason should have come unto them, either by the Testators good-will, or by the benefit of the Law. And yet there is no remedie for this in Law, so farre as I know, for that all these making but one person in Law, the Law yeelds no action to the one to sue the other: but yet the ancient practise of the Ecclesiasticall Law hath remedie, which would redresse all this mischief, if it were called again to use, & might go without controulment, as the equity of the cause doth require. And the remedie is this, that such other of the Executors

or Administrators as are in this sort intervverted from the execution of the Will, or administration by the subtiltie of any like Executor or Administrator, should crave the assistance of the Judge, and will him by vertue of his office, to call in such practicke Executor or Administrator, and to command him under paine of excommunication, hee proceed no further in the sole execution thereof, but communicate all his acts, and dealings with the rest of his Coexecutors or Coadministrators: which if it were so ordered, would make many mens Wills and administrations better performed than they are, and a great sort of poore Orphans states more sure and certaine, than commonly they are in such Executors or Administrators hands.

And certainly in this case, there is some good use of Supervisors in dead mens Wills (whom many men meerly jest at, calling them candle-holders, as though they could doe nothing else in the execution thereof, but hold the candle while the Executors tel the defuncts mony) if they might be permitted to put in practise that authority which the Law giveth them, and that is when they finde any Executor deale fraudulently in the execution of any Testators Will, wherein they are named supervisors, or do ingrosse all the state of the Defunct into his hands, as hath beene before said, they call him to a particular account, that it may be seene how the administration stands, and each Executor may communicate to other particular receipts and disbursements: which if any shall refuse to doe, then may the Supervisor make thereof complaint unto the Judge, as though the same man dealt not truly in the execution thereof, who though perhaps in the beginning could not take bond of him, for the true execution of the Will (because the Testator had made choice of him, and therein approved his faith, and that no man required caution of him for any Legacie in the Will bequeathed, in which case the Judge might take bond of him for security of such Legacies as are bequeathed in the Will, yea though his faith hath been approved by the Ordinary, as hath beene before remembred) yet may the Judge:

ff. De administratione tutorum. l. 3. s. 1.

*Instit. de suspen-
dutorib. vel
curator. toto.
tit.*

Judge in this case, if he finde him justly suspected of fraud and deceit, remove him by the learning of that Law. For neither the Testator himselfe, if hee were alive againe, would indure him in this case, but would blot his name out of his Will, neither ought the Judge to suffer him, whose care is to see that dead mens Wills take their effect, according to the Testators meaning. All which the Law hath provision for, and for infinite things else of like good order in these cases, if they might be suffered to put them in execution without impeachment.

And so farre as concerning those things wherein the Civile, and the Ecclesiasticall Law might be releev'd, without prejudice to the Common Law, for because they have no practise thereof: and yet do not I bring forth these as the onely causes wherein the Civile and Ecclesiasticall Law may be licenced to deale in, over and besides the practise of those things that they have already, but that these are few among many other which might be sorted out, if so be there were any hope for the further enlargement of the profession.

CHAP. III.

Of the necessity of retaining the practise of the Civile and Ecclesiasticall Law in this Land.

BUT now to the necessity of the maintenance of the Civile and Ecclesiasticall Law in this Realm, as they are now practised, or ought to be practised, which was a thing first propounded, but last put in execution in this worke.

Albeit that which hath beene already said as concerning the Civile and Ecclesiasticall Law may well imply the necessary preservation of them both within this Land, yet because it was a thing I promised to shew in the beginning of this Treatise, after that I had gone over the rest of the parts

parts of my division, I will in a word or two make plaine the necessity thereof.

And therefore for a ground of all the rest, I will assume this for a matter confessed, that every man knowes that every well ordered Common-wealth stands on two parts principally, the politick part, which consisteth of the Prince and people, and the Ecclesiasticall part, which standeth in *Sacris & Sacerdotibus*. And therefore well said the Emperour, Two of the greatest things that God ever gave unto the world (meaning earthly things) was the Empire or secular government, whereby the outward man is ordered and made, as *Aristotle* said, *bonus civis*, that is, a good and loyall subject: and the Priesthood whereby the inward man is ruled, and is made, as the said Authour testifieth, *bonus vir*, that is, a good and vertuous man, which are two wonderfull effects of the whole government in generall; neither can the one of these be wanting, but the other will be ruined and brought to desolation.

*In authent.
quon. oport. E-
piscopos in
prin. col. 1.
Auth. de non
alienand. &c.
rebus Eccl. 2
S. 1.*

Secondly, no man is ignorant of this, but in politique government, two things sway the whole state, the one is peace at home, and the other is warre abroad: which as they have their seasons, so they have their causes and effects, the one from counsell at home, the other from discipline abroad; neither can the one, or the other of these be maintained, but by their private and proper Lawes.

Beside, in peace who seeth not, there is as much need of vent by sea, for to benefit the Common-wealth by, either by importation of those things which we want at home, or by exportation of those things we abound with; as there is provision to be made for the increasing and preserving of those things that we have rising and growing by land in our owne cuntry, neither of which can be had or enjoyed without their proper Lawes fit and appertaining to either policie? And what Law is there that ordereth these businesses but the Civile Law onely, which giveth a forme to Navigation, and all occurrents that happen by sea, whether they be in, or about the Navigation it selfe or the

contracts, or as it were contracts that are made in upon, or beyond the same.

As a Legall forme is requisite in peace at home, and Marine affaires abroad, that every thing may have his due effect according to the right thereof, so also it is necessarie in warlike exploits upon the Sea, that every action have his limits and bounds, whereby Justice may bee ministred: which if it be to be observed where lawfull warre is held betweene Prince and Prince, that every one be not left unto his owne lust, much more it is expedient to be put in ure in Piracies and other Sea-robberies, where the innocent is spoyled, and the spoiler is enriched. The redresse whereof is not, but by the Admirall Law, to whom the Princes of this Land have granted that authority.

For the often commerce of Princes with Princes, and the negotiation that one State hath with another, there is nothing more necessary, than frequent Embassages whereby intelligence may be had, what danger one State intendeth to another, & how the same may be prevented by Leagues or otherwise, and how the same may be made and maintained: I know not what Law serves better for all these ends and purposes than the Civile Law.

In matters that appertaine to the soules health, the Preacher teacheth out of the word of God, wherein the right service of God standeth, hee ministreth the Sacraments unto the people, and instructeth them in other fundamentall points of Religion, but it is the Ecclesiasticall Law that compelleth men to the due observance hereof, and punisheth the transgressors.

All men grant, that there is a provision to bee made for the Minister, for that it is against reason that any man should goe to warfare on his charges: but it is the Law of the Church that sets out this provision, and yeeldeth remedie for the recoverie thereof if it be denied.

Nothing is more due unto the dead, than that their last Wils should be observed; for that it is such an ordinance as a man hath not in his power againe, when God hath
once

once called him hence, neither is there any thing that Princes have more gratically granted unto their subjects, than that in their life time they may dispose of that which after they are dead is none of theirs; and yet shall take place when they are not, as though yet they were theirs: in which provision the Civile and the Ecclesiasticall Law, are above all other Lawes most religious.

Chriftening, Wedding, Burying, whereby a man entred into this world, converseth in the world, and returneth againe unto the earth, from whence he was taken, and so after passeth to glory, and everlasting blisse, are every one of the Ecclesiasticall cognifance.

How many men of great skill, such as few Princes have greater in all kinde of learning, are of this ranke, not only in the societie of them that professe this knowledge here in the chiefeft City of the Land, but also in both the Universities, and in sundry other places of this Realme, not strangers, or forrainers, but home-borne subjects, of the same faith, of the same religion, of the same kindred, and family, of like allegiance to the Prince, and service to the Commonwealth as other his good subjects are, even those that oppugne this profession chiefly; whose practice, if it be overthrowne, or provision lessened, not only those that are now present, and make profession of this knowledge, shall be faine to turne their copie, but those that are futrely to come, will change their profession, when they see there is no reward or estimation belonging thereto? for it is honour that nourisheth Arts, and no man will follow that profession that is out of count and credit; but every Father will say unto his Son in like sort as *Ovids* Father said to him, when hee saw him addict and give himselfe wholly to Poetry, *Studium quid inutile tentas?* It was anciently said of the profession of these Lawes, *Dat iustinianum honores*; but now it is so farre off from that, that it conferres honours, as that it is almost a discredit for any man to be a Civilian in this State, and the profession thereof doth scarce keepe beggerie from the gate.

Exod. 25.

James 2.

As God doth dispose his government by justice & mercie (whereof notwithstanding mercie hath the supreme place in the Lords Tabernacle, as that which was put above upon the Arke, wherein werethe two Tables of stone, in which the Law was written, to which St. James alluding, saith, that mercie triumpheth over judgement) so the Princes of this Land to the imitation of that heavenly representation, have appointed two supreme seats of Government within this Land, the one of justice, wherein nothing but the strict letter of the Law is observed, the other of Mercy, wherein the rigour of the Law is tempered with the sweetnesse of equity, which is nothing else but mercy qualifying the sharpnesse of Justice: to either which Courts they have sorted men fit for their skill, and education to manage the same; that is, to the seat of Justice, the professors of the Law of this Land, who may be thought best to know the Justice of the same: but to the other they have assigned the professors of the Civile Law, for that a great sort of titles of that Law, are titles of equity, as, whatsoever is *jus pratorium*, or *jus edilicium*, with them is matter of equity; so that they may seeme best able for their skill in these titles (of which no other Land hath the like) to assist the Lord Chancellour in matters of Conscience. Who though he be a man, for the most part, chosen by the Prince himselfe, out of the rest of the Sages of this Land, for his speciall good parts of learning and integrity above the rest (as now the honourable Person is that occupieth that place, who is, as Tully said of that eloquent Orator *Marcus Crassus*, *Non unus ex multis, sed unus inter omnes propè singularis*) so that they might be thought for their great and eminent wisdom in all things appertaining to their place, able to direct themselves; yet because it is, *Divinitatis potius quam humanitatis, omnium rerum habere memoriam, & in nullo errare*, as one saith. It was providently done by Princes of former age, to joine to these great personages, men furnished with knowledge in these cases of conscience; wherein if they should at any time stick, they might be advised by them that are assessors with

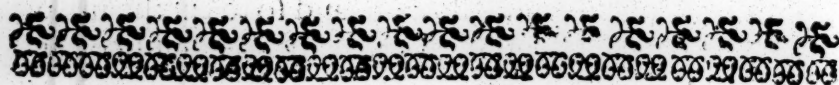
with them, what they find in the law proportionable to the case in hand, that thereto they might square their decree, or order accordingly; whose variety in these cases is such, that hardly there can fall out any case in practice, but there will be some Law in that learning, conformable unto it: which opportunity of men furnished with this knowledge for that feat, his Majesty shall want, unlesse the study of the Civile and Ecclesiasticall Law be maintain'd, which also for the cases of equity and conscience therein, is cald of the old writers, *Aequitas Canonica*.

And what reason gave occasion to these precedent Princes to place men indowed with the skill of the Civile Law, in the Court of Chancery, the same also ministred unto them mindes to commit unto the selfe same men the ordering of their Courts of Requests: for that therein, for the most part are handled poore miserable persons causes, as widows and Orphans, and other distressed people, whose cases wholly relie on piety and conscience, as a fit subject for that Law to deale in, which also will take a maim, if the studie of the Civile Law be not upholden.

So then to deny a free course to the Civile and Ecclesiasticall Law in this Land, in such things as appertain to their profession, or to abridge the maintenance thereof, is to spoyle his Majesty of a part of his honour (whose glory it is to be furnished with all sorts of professions necessary for his state, and beneficiall for his subject) to weaken the state publike, and bereave it of grave and sage men, to advise the State in matters of doubt and controversie betweene foraine Nations and themselves, to disarme the Church of her faithfull friends and followers, and so to cut the sinews (as much as in them lyeth) of Ecclesiasticall discipline, and to expose her to the teeth of those, who for these many yeares have sought to devoure her up, and so now would do it, if the mercifull providence of God, and the gracious eye of the Prince did not watch over her.

And so far of the necessity of these two professions, and generally of the use and disuse of the Civill and Ecclesiasti-

call Law in this Land, and wherein it is overlaid by the Common-Law, and how it may be receaved, if it seeme good unto his Majesty, and the wisdome of this Realme. All which I have written, not of any purpose to derogate from the credit of that Law, under which I was borne, and by which I hold that smal maintenance that I have: (for I reverence it as a necessary Law for this State, and make such reckoning of every of the professours in his place, as becommeth me) but that it pitttieth me, and not onely me, but all those that render good learning, and have no prejudicate minde toward the Common-Law, to see two such Noble Sciences as the Civile and Ecclesiasticall Law are, so to be disgraced, as that there is no more reckoning made of them, or their professours, than if they were matters and men of no worth, and fit or apt for no service in the Common-wealth: and yet notwithstanding the use of them is so necessarie as that the Common-wealth cannot want the service of them in matter of great importance to the State, which if the profession should come to a downefall, as it is like shortly to do, if it be no more cherished and made of than it is) will be sooner seene by the want of them, than is now perceived by the having of them; and then perhaps, will the State lament for the losse of so goodly a profession, when it will be hardly recovered againe, as the children of *Israel* did for the tribe of *Beniamin*, when they had in one day slaine well nigh the whole number of them,



FINIS.





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